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What is known as the Interchangeable Mileage Act of Massachusetts, which became a law in 1892, has been declared unconstitutional by the Supreme Court of that State in an action brought by the attorney-general against the Old Colony Railroad Co., to compel the respondent to sell mileage tickets to all who apply for them and to redeem all such tickets presented by any other railroad corporation. The court holds that the law "authorizes one railroad to determine the conditions on which another railroad must carry passengers and compels one railroad to carry passengers on the credit of another. * * * A carrier can have no lien on the passenger to secure payment of the fare and must of necessity collect the fare in advance or trust to the credit of the passenger or some other person. Although by reason of the public nature of the employment the legislature can establish the rates of fare to be demanded by common carriers of passengers, we do not see that they can be compelled ultimately to take in payment anything which any other person could not be compelled to take in payment of a service rendered or in discharge of a debt." The court also points out that "the statute puts no limit upon the number of mileage tickets which any road may issue, or upon the time within which they may be used." And it supposes the case in which one road deluges the market with tickets which afterward it is unable to redeem. Further, the point is made that "the security for the ultimate payment of the fare in money ought to be as certain as that required when private property is taken for public uses." And they are of the opinion that this statute does not provide adequate security. After denying the power of the legislature to determine the form of the contracts which common carriers of persons or merchandise must make concerning transportation, and without considering the authority of the legislature to delegate this power to a board of public officers, the court is of the opinion that "this power cannot be delegated to private persons or corporations."

Judge Knowlton's dissenting opinion, in which Judge Holmes concurs, takes the ground that the objections of his colleagues are "theoretical and speculative rather than practical." And he holds that "the reasonableness and constitutionality of the statute are to be determined in view of the existing facts in the management of railroad business and not in view of the legal possibility that some corporation would insert in its mileage tickets an unusual or absurd provision." In a certain sense it may be said that it is possible to suppose cases in which almost any law will work injustice, and if the point made by Judge Knowlton is properly taken, it forms a strong argument against the decision of the majority. The act itself seems to have been framed with a view to such cases as the Supreme Court has supposed possible, for it is provided that the railroad commission may suspend the provisions of the act in any case where "the public welfare or the financial condition of the road require or demand" such suspension.

It is gratifying to notice the recent holding of the Supreme Court of Georgia in the case of Tompkins v. Compton, that under the laws of Alabama, in the absence of express statutory authority, there could be no consolidation of the stock of one corporation with that of another so as to create a consolidated company composed of the stockholders of both corporations; that to attempt such a scheme over the objection or anticipated objection of a minority of the stockholders in either corporation is illegal and contrary to public policy; that where, in contemplation of such an illegal scheme and for the purpose of carrying it into effect, some of the stockholders in one corporation sold their stock to some of those in the other, and were to be paid therefor in part by a transfer of stock of the consolidated company when such company should be formed, the sale was tainted with the element of illegality on the part of the sellers as well as the buyers, and if the consolidated company were not formed and never issued any stock, and because the buyers were thereby unable to deliver the stock they executed to the sellers their notes or bonds promising to pay a sum of money in lieu of making a delivery of the stock, these notes were tainted with the illegality which attached

to the contract of sale, and for that reason were not collectible. The legal principle applicable to the case, the court said, was that where both parties to an illegal contract were to share in the fruits thereof, and the contract failed to bear some of the anticipated fruits, an undertaking by way of compromise of one of the parties to compensate the other for his disappointment was illegal and therefore void. The court said, in conclusion, that one who purchases promissory notes or bonds founded upon a consideration illegal and contrary to public policy, with full knowledge of the facts, takes them subject to all the defenses which might be urged against the original payee.

NOTES OF RECENT DECISIONS.

NATURAL GAS COMPANIES—DUTY TO FURNISH GAS—MANDAMUS.—Among the points decided by the Supreme Court of Indiana in Portland Natural Gas & Oil Co., 34 N. E. Rep. 818, is that a natural gas company, occupying the streets of a town or city with its mains, owes to the owners and occupants of houses abutting on such streets the duty of furnishing them with such gas as they may require, where they make the necessary arrangements to receive it, and comply with the regulations of the company; and, on its refusal or neglect to perform such duty, it may be compelled to do so by writ of *mandamus* and that to entitle the owner of such a house to the right of being supplied with natural gas, it is not necessary that he should own an interest in the company, different from that held by other citizens. The court while admitting that there are cases which hold that in the absence of a contract, express or implied, and where the charter of the company contains no provision upon the subject, a gas company is under no more obligation to continue to supply its customers than the vendor of other merchandise—among which is the case of Com. v. Lowell Gaslight Co., 12 Allen, 75, claims that the better reason, as well as the weight of authority, is against this holding. Mr. Beach, in his work on Private Corporations (volume 2, § 835), says: "Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets, whose fee is held by the municipal corporation in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain. Accordingly, a gas company is bound to supply gas to premises with which its pipes are connected." Mr. Cook, in his work on Stock and Stockholders and Corporation Law (section 674), says: "Gas companies, also, are somewhat public in their nature, and owe a duty to supply gas to all." To the same effect are the following adjudicated cases: State v. Columbus Gaslight & Coke Co., 34 Ohio St. 572; New Orleans Gas Light Co. v. Louisiana Light & Heat Producing, etc. Co., 115 U. S. 656, 6 Sup. Ct. Rep. 252; People v. Manhattan Gas Light Co., 45 Barb. 136; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. Rep. 553; Williams v. Gas Co., 52 Mich. 499, 18 N. W. Rep. 235; Gaslight Co. v. Richardson, 63 Barb. 437. Our general assembly, recognizing the fact that natural gas companies were, in a sense, public corporations, conferred upon them the right of eminent domain by an act approved February 20, 1889 (Acts 1889, p. 22). It has often been held that *mandamus* is the proper proceeding by which to compel a gas company to furnish gas to those entitled to receive it. 8 Amer. & Eng. Enc. Law, pp. 1284-1289; People v. Manhattan Gaslight Co., *supra;* Williams v. Gas Co., *supra;* Gaslight Co. v. Richardson, *supra*.

CRIMINAL PRACTICE—MURDER—CHANGE OF VENUE.—A portion of the opinion in the case of State v. Crafton, 56 N. W. Rep. 257, decided by the Supreme Court of Iowa, discusses in an interesting manner the question of grounds for change of venue in a prosecution for murder. The affidavit in the case alleged that the prejudice in the county was so great as to prevent a fair trial; that after the alleged murder, sensational comments were published in the daily local papers; that such accounts declared defendant a slayer and villain; charged that he had seduced the decedent; that his father had once been indicted for the same offense; that defendant was a burglar; that he had stolen a ring from decedent after her death; that he had murdered a man in Nebraska; that he killed decedent to prevent it being known that she was pregnant; that he enticed women for

purposes of prostitution. The State filed an affidavit of ten men who swore that they read "some" of the newspaper accounts of the killing of decedent by defendant, and had heard the matter talked of "some" among residents of the county and from what they heard and read, believed there was no prejudice against defendant. It was held reversible error to overrule the motion for change of venue. Kinne, J., says:

The application for a change of venue is addressed to the sound discretion of the court. It is a judicial discretion, and not to be interfered with by us unless it has been abused. State v. Rowland, 72 Iowa, 327, 33 N. W. Rep. 137; State v. Beck, 73 Iowa, 616, 35 N. W. Rep. 684; State v. Cadwell, 79 Iowa, 473, 44 N. W. Rep. 711; State v. Woodard (Iowa), 50 N. W. Rep. 885.

In the light of the facts above set out, and of the rule of law so wisely established, we are to determine whether or not the court erred in its ruling. We have in mind also that it is the policy of our law to make the execution of justice as speedy as is consistent with a due regard to the rights of a man charged with a grave crime. The resistance does not deny the publication of the articles as charged. It does not deny that they created a prejudice against the defendant, and that such prejudice existed after the killing. The denials of prejudice, as made, relate only to the time of the filing the affidavit of resistance. The only question of controversy between the two showings is that defendant's showing is that the excitement and prejudice continued to exist up to the time it was filed, while the State's showing is that it did not exist at that time. It was not incumbent upon the defendant to set out the newspaper articles, especially so as there is no denial that they were published as claimed by the defendant, and that they, for a time at least, had the effect which he claims. The question of prejudice is a question to be determined from facts before the court in the showings made. Now, it is clear that the showing of the defendant, in the absence of one made by the State, would have entitled him to the change. What facts, then, appear in the State's showing which would be held sufficient to overcome that made by the defendant? It does not appear that the State's affiants had read all or even any of the articles which contained the specific charges set out in defendant's showing, and on which the change is prayed. There is not a fact which shows that the change was sought for delay, and not in the best of faith. There is nothing to show what the opinion of the State's affiants is based upon, except that they had read "some" of the accounts of the killing, and had heard the matter talked of some among the residents of the county. Doubtless, there may be cases where such a counter showing would be sufficient that depends upon the facts stated by the other side; but we cannot think that in a case like this, where the defendant is charged with the commission of many and grave crimes, some of them of the most revolting character, the very charging of which was calculated to engender prejudice in the public mind, which would be deep-seated and far-reaching, that such a showing in resistance of the application should be regarded as sufficient. Defendant was a comparative stranger in the city. His associates, to say the east, had been bad, and here was the press of the city poisoning the minds of the people against him by charging him with the commission of innumerable crimes. Counsel for the State insist that this case is distinguishable from the cases of State v. Canada, 48 Iowa, 448, State v. Nash, 7 Iowa, 347, and State v. Billings, 77 Iowa, 417, 42 N. W. Rep. 456, in that in the last two cases it appeared that there had been threats of lynching made against the defendants, and in the Canada Case no resistance was filed. These are distinguishing facts; but is public excitement and prejudice, which will prevent a defendant from having a fair trial, to be measured only by a single act in all cases, and that a threat? Must the court, in the exercise of its discretion, say that, because excitement and prejudice have not yet arrived at the point where threats to do personal violence to the person of the defendant are made, therefore it appears that prejudice does not exist? The admitted facts upon which defendant's application is based, show, to our minds, that an opinion based, thereon is entitled to more weight than one based upon the meager facts stated in the State's showing. State v. Beck, 73 Iowa, 616, 35 N. W. Rep. 684. Each case must depend upon its own peculiar facts and circumstances. We know how difficult it is for an Appellate Court to see these matters as they may have appeared to the trial judge, and hence it becomes us to be exceedingly careful in passing upon the question of the proper exercise of the discretion vested in the trial court. When, after due investigation, we are satisfied that the trial court has made a mistake, it is our duty to rectify it as far as possible. The language of this court in the case of State v. Nash, *supra*, is applicable in this case. It was there said: "It is important, to maintain the usefulness of our judicial system, that no suspicion of influence from popular excitement in the administration of the law should be allowed to impair the public confidence in the fairness and impartiality of judicial proceedings. An excited state of public feeling and opinion is always the most unfavorable for the investigation of truth. Not only should the mind of the juror be wholly without bias and prejudice, it should not only be free from all undue feeling and excitement in itself, but it should be, as far as possible, removed from the influence of prejudice and feeling and excitement in others." A man charged with the commission of the grave crime of murder has a right to be tried by an impartial jury, and in a community where his case has not been prejudiced and prejudged. It matters not what the standing or reputation of this defendant may be, or how low his condition, the law throws around him all the safeguards which the enlightened wisdom of the ages has shown essential to the safe, orderly, and impartial administration of justice. Considering the magnitude of the crime charged, the limited time between the homicide and the trial, the showing made for a change of venue, and the weakness of the resistance, we are impressed with the conviction that the court below erred in overruling the defendant's motion.

CONFLICT OF LAWS—STATUTE OF FRAUDS—PAROL CONTRACT FOR SALE OF LAND.—The Supreme Court of Illinois decide in Miller v. Wilson, that a parol contract for the sale of land in another State executed in that State is enforceable in Illinois in the absence of any proof that the laws of such State require such contract to be in writing since a contract valid where executed is enforceable,

even though it would be invalid if executed in the State in which suit is brought. Craig, J., says:

Conceding the facts to be as found by the Appellate Court and recited in its judgment, the question is whether the judgment rendered by that court is one unauthorized by the facts. The contract sued upon was executed in Kansas, it related to lands in Kansas, and the Appellate Court reversed the judgment rendered in the Circuit Court on the contract on the ground that there was no memorandum signed in writing by the defendant, and that the contract was within the statute of frauds of this State, and hence an action could not be enforced upon it. It will be observed that the statute of frauds of Kansas, where the contract was executed, and where the property sold was located, was not pleaded, but the plea of the defendant set up the statute of frauds of this State. It will also be observed that the record contains no evidence whatever that the State of Kansas has enacted a statute of frauds or that there is any law in that State requiring a contract relating to the sale of lands to be in writing. If, therefore, the contract in question was valid in Kansas (and it must be so held in the absence of a law in that State to the contrary), and it is to be controlled by the laws of that State as to its validity, then the judgment of the Appellate Court was erroneous; on the other hand, if the contract is to be governed by the laws of this State, where the action was brought upon it, then the decision of the Appellate Court was correct. The question, therefore, to be determined, is whether the *lex loci contractus* is to control, or whether the contract shall be governed by the *lex fori*. As a general rule, a contract valid in the State where it is executed may be enforced in another State. Thus, in Roundtree v. Baker, 52 Ill. 241, this court held, where an instrument executed in the State of Kentucky prior to the abolition of slavery for the purchase price of a negro slave sold there was sued upon in this State, that the contract, being valid and enforceable where it was made, will be enforced in our courts under the law of comity, notwithstanding such a contract could not have originated here, by reason of slavery being prohibited in this State. It is there said. "It is a general rule that we look to the law of the place where the contract is entered into, and not where it is to be enforced, to ascertain its validity; not only so, but in expounding its terms and conditions." Suth. St. Const. § 471, says: "The laws which exist at the time and place of the making of a contract determine its validity, construction, discharge, and measure of efficacy for its enforcement. A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity." It is a familiar rule that the laws existing at the time and place of the execution of a contract enter into and form a part of the contract. Thus, in Edwards v. Kearnzey, 96 U. S. 595, it is said: "It is the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement." A very interesting case on this subject is Cockran v. Ward (Ind. App.), 29 N. E. Rep. 795; and, as the opinion in that case refers to and quotes from a number of authorities, we quote from the language of the opinion: "In the case of Low v. Andrews, 1 Story, 38, it was held that a contract for the sale of goods in France, if valid there, would be enforced in this country, though within the statute of frauds here. In Scudder v. Bank, 91 U. S. 406, it was held that, in an action upon the parol acceptance of a bill of exchange to be performed in Missouri, the statute of frauds of the place of the contract should control, as it affected the formality necessary to create a legal obligation. The case of Kling v. Fries, 33 Mich. 277, was an action in Michigan upon a contract for the sale of goods in Ohio. It was held the Ohio statute of frauds applied. The case of Houghtaling v. Ball, 19 Mo. 84, was an action in Missouri upon a contract for the sale of wheat to be delivered in the State of Illinois. It was decided that the Illinois statute of frauds obtained. The case of Anderson v. May, 10 Heisk, 84, was an action in Tennessee upon a lease for lands in Arkansas. The court decided that the statute of frauds of the latter State should be allowed to control the contract. Denny v. Williams, 5 Allen, 1, was an action in Massachusetts upon a contract for the sale of wood in New York, and the defendant set up the New York statute of frauds. The court held the answer good, saying as the contract was made in the city of New York, and was to be performed there, the laws of the State of New York must govern as in respect to its construction and performance. The Supreme Court of Louisiana, in Vidal v. Thompson, 11 Mart. (La.) 23, said an instrument, as to its form and the formalities attending its execution, must be tested by the law of the place where it was made. In Pickering v. Fish, 6 Vt. 102, the court used this language: 'As to the requisites of a valid contract, the mode of authentication, the forms and ceremonies required, and, in general, every thing which is necessary to perfect or consummate the contract the *lex loci contractus* governs, though with respect to conveyances or other contracts relating to real estate the statutory regulations of the place where such estate is situated must be observed.'"

As observed before, the contract involved was executed in Kansas, related to property in that State, and was to be performed in Kansas. Under the authorities cited, the laws of Kansas entered into and formed a part of the contract and if the contract was valid in that State although it may be prohibited by our statute of frauds, our courts, under the doctrine of comity, on an action on the contract could no less than enforce it. If the laws of Kansas rendered the contract void or voidable for the reason that it related to lands and was not in writing, that was a matter the defendant was bound to plead and prove. As was held in Smith v Whitaker, 23 Ill. 367, a contract made in another State or in a foreign country will be presumed to be made in accordance with the laws of the place of its execution, and a violation of those laws, if relied on as a defense, must be pleaded and proved. Here the defendant interposed a plea of the statute of frauds, but did not set up that it was the law of or a statute in Kansas. In the absence of an averment that the statute was one of another State, we will presume it was the statute of our own State. But if the defendant had pleaded the statutes of Kansas he would occupy no better position, for the reason that no proof whatever was introduced tending to show what the statute or law of Kansas was. From what has been said, if we are correct, our statute of frauds, relied upon by defendant, was no defense. The judgment of the Appellate Court will be reversed, and the judgment of the Circuit Court will be affirmed.

RIGHTS AND REMEDIES OF PREFERRED SHAREHOLDERS.

§ 1. *Their Right to Dividends.* — The right of preferred shareholders to dividends rests on a footing entirely distinct from that of a common shareholder. A dividend is not a debt due by the corporation to the shareholder until it is declared and until the time of payment has arrived.[1] But the propriety of declaring a dividend upon common shares rests in the discretion of the directors, in such a sense that equity will not compel them to declare such a dividend unless the refusal to do so has been the result of fraud, caprice or manifest abuse.[2] On the other hand, the right to dividends on preferred shares is, from the nature of the shares, a right resting partly, at least, in contract, for the scheme which creates the preference under which the shares are issued, results in a contract between the corporation and the shareholder as soon as the shares are purchased by and delivered to him. This contract may have for its foundation a by-law;[3] but whatever may be the nature of the instrument creating the preference, it is assumed in all cases that the right is a right resting in contract and enforcible by the shareholders on the theory of a contract. But yet, except in the case of interest-bearing stock or guaranteed stock, spoken of in a preceding article,[4] this right is not a right of an absolute nature. It is not a right to interest or to a dividend in any event, but it is, as has often been held in England, a right to interest, chargeable exclusively upon profits;[5] in other words, it is a guarantee of a dividend in case it shall turn out that there is anything to divide.[6] It amounts merely to an engagement to divide earnings among the preferred stockholders in preference to those who are not preferred. If there are no earnings in a particular year, they get no dividend in that year. Whether there are earnings in a particular year, which can be divided among the preferred stockholders, is a matter for the directors to determine in the first instance in the exercise of a sound and honest business discretion, and subject to the control of the courts in case their discretion is abused, as hereafter shown.[7] Such a claim makes the holder of the share certificate a stockholder, and not a creditor.[8] If a dividend were guaranteed, or if the promise were to pay interest on the shares absolutely and in any event, he would, to that extent at least, be a creditor. Where the corporation guarantees (as is sometimes the case) not only interest on the stock, but also agrees to receive back, or otherwise liquidate the principal of the shares at par, at a date named, then the certificate becomes substantially an interest-bearing bond of the corporation, and the holder to the fullest extent a creditor, although he may also have rights pertaining to a shareholder, such as the right to vote at corporate meetings. It has been pointed out that under some schemes, what has been called "preferred stock" is really an interest bearing debenture of the corporation, which creates the relation of debtor and creditor between the corporation and the so-called shareholder.[9] Whether the scheme and the certificate issued in pursuance of it creates stock in the corporation or an indebtedness of the corporation to the

[1] Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Taft v. Hartford, etc. R. Co., 8 R. I. 310, 5 Am. Rep. 575; Henry v. Great Northern R. Co., 1 De Gex & J. 605, 3 Jur. (N. S.) 1133; Stevens v. South Devon R. Co., 9 Hare, 312.

[2] Hunter v. Roberts, etc. Co., 83 Mich. 63; Williams v. Telegraph Co., 93 N. Y. 187; King v. Patterson, etc. R. Co., 29 N. J. L. 82; Park v. Locomotive Works, 40 N. J. Eq. 114; Railroad Co. v. United States, 99 U. S. 420; Minot v. Paine, 99 Mass. 101; Ely v. Sprague, 1 Clarke, Ch. (N. Y.) 351; Stringe's Case, L. R. 4 Ch. 490.

[3] Belfast, etc. R. Co. v. Belfast, 77 Me. 445; Hazeltine v. Belfast, etc. R. Co., 79 Me. 411, 1 Am. St. Rep. 330.

[4] The article entitled "Preferred Stock," 37 Cent. L. J. 105.

[5] Henry v. Great Northern R. Co., 3 Jur. (N. S.) part I, 1133, 1 De Gex & J. 606. See also Crawford v. Northeastern R. Co., 3 Jur. (N. S.) part I, p. 1093; Matthews v. Great Northern R. Co., 5 Jur. (N. S.), part I, p. 284.

[6] Taft v. Hartford, etc. R. Co., 8 R. I. 310, 5 Am. Rep. 575.

[7] New York, etc. R. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. Rep. 209.

[8] Under an act empowering certain counties to subscribe for preferred stock of a certain railroad, to bear seven per cent. interest, it was held that a county was not to be a creditor, but a stockholder, and that their stock was to be preferred over the common stock by being entitled to seven per cent. interest out of the dividends in advance of the others. An expression in the certificate "prior and in preference to any dividend upon the capital stock of the company" was objectionable as implying that the county was not a stockholder. State v. Cheraw, etc. R. Co, 16 S. C. 524.

[9] Such was the case in West Chester, etc. R. Co. v. Jackson, 77 Pa. St. 321; in Burt v. Rattle, 31 Ohio St. 116; and in Williams v. Parker, 136 Mass. 204.

scripholder must depend on the terms of the authorizing statute, of the resolution under which the certificates are issued, and of the certificates themselves. It is ruled in Ohio that where a resolution adopted by stockholders of a railroad company, authorizing the issue of preferred stock, recites that it is to be issued under an act which authorizes the issue of preferred stock, and not of certificates of indebtedness, referring to it by its title and date, which resolution is made a part of the certificates thereafter issued, such certificates will be held to be certificates of stock, unless, considering the whole transaction, it is clear that the purpose was to create a debt, and unless a debt was in fact created.[10] It has been held that when no profits have been earned out of which a preferred dividend can be paid, the holder of preferred shares on which a dividend is guaranteed at a certain rate per annum, "before any dividends shall be paid on other stock of said company," cannot maintain an action of *assumpsit* for the recovery of the annual dividend thus guaranteed.[11] In the case of a corporation having public duties to perform, such as a railway company, this right to preference dividends, is to some extent, at least, subject to the discretion of the directors. They must, at least in the first instance, determine whether there are profits which can properly be divided. It is not enough that there may be net earnings, because the public duties which the corporation is bound to perform may require the absorption of these net earnings in maintaining its roadbed and equipment.[12]

§ 2. *What are "Net Earnings" to be Appropriated in Dividends of Preferred Shares.* —This question has been answered thus by Sir George Jessel, M. R.: "That means this, that the preferred shareholders only take a dividend if there are profits of the year sufficient to pay their dividend. * * * They are co-adventurers for each particular year, and can only look to the profits of that year. If they are lost for that year, they are lost forever. Profits for the year mean the surplus receipts, after paying the expenses and restoring the capital to the position it was in on the first day of January of that year."[13] The same view is thus expressed by a modern writer of reputation: "The directors of a corporation have a discretionary power to withhold profits from the holders of common shares in order to accumulate a surplus, etc.; but it is the duty of the directors to pay the preferred shareholders their promised or guaranteed dividends, whenever the company has acquired funds which may rightfully be used for the payment of dividends. This rule applies with peculiar strictness where the preferred holders are entitled to receive their dividends annually out of profits earned during the current year only, and a deficit in any year does not become payable out of subsequent profits."[14] Similarly, the following definition by Mr. Justice Blatchford has been often quoted: "Net earnings are, properly, the gross receipts, less the expense of operating the road to earn such receipts. Interest on debts is paid out of what thus remains, that is, out of net earnings. Many other liabilities are paid out of net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders, to go towards dividends, which in that way are paid out of the net earnings."[15] "Net earnings are what is left after paying current expenses and interest on debt and everything else which the stockholders, preferred and common, as a body corporate, are liable to pay."[16] But if a corporation has a funded interest-bearing debt which represents so much borrowed capital, and is able to maintain its plant in a suitable condition for the conduct of its business and to pay the interest on such funded debt, the directors will ordinarily not be justified in allowing profits to accumulate in a reserve fund

[10] Miller v. Ratterman, 47 Ohio St. 141, 23 Ohio L. J. 416.

[11] Taft v. Hartford, etc. R. Co., 8 R. I. 310, 5 Am. Rep. 575.

[12] New York, etc. R. Co. v. Nickals, 119 U. S. 296, 306.

[13] Dent v. London Tramway Co., L. R. 16 Ch. 344.

[14] Mor. Corp. 2 Ed. § 459.

[15] St. John v. R. Co., 10 Blatchf. (U. S.) 271, 279, affirmed 22 Wall. (U. S.) 136. In Elkins v. Camden, etc. R. Co., 36 N. J. Eq. 233, 239, it is said in discussing this question that "rights are to be governed and regulated each year by the peculiar condition of the corporation at the close of the year." This is in conformity with the definition of profits as given in People v. Supervisors, 4 Hill (N. Y.), 20, by Bronson, J.: "Profits generally mean the gain which comes in or is received from any business or investment where both receipts and payments are to be taken into account." See also the reasoning in Belfast, etc. R. Co. v. Belfast, 77 Me. 445, 452; New York, etc. R. Co. v. Nickals, 119 U. S. 296.

[16] Warren v. King, 108 U. S. 389, 398.

for the purpose of liquidating the funded debt when it matures, to the exclusion of the right of preferred stockholders to their dividends. Such a rule, it has been pointed out, would in the case of many, if not most of the American railways, result in withholding the dividends from preferred stockholders indefinitely. The hardship is especially apparent when the rule is recollected,[17] that where the dividends for a particular year are passed because there are no net earnings to divide, the right to that dividend is lost forever. The justice of the rule becomes more apparent when the well-known practice of railway companies and other corporations of paying their funded debt at maturity by refunding or issuing new bonds secured by a new mortgage, is considered.[18] The following by-law has been the subject of judicial interpretation: "Dividends on the preferred stock shall first be made semi-annualy from the net earnings of the road, not exceeding six per cent. per annum, after which dividend, if there shall remain a surplus, a dividend shall be made on the non-preferred stock up to a like per cent. per annum; and should a surplus then remain of net earnings, after both of said dividends, in any one year, the same shall be divided *pro rata* on all the stock." The meaning of this by-law is that the preferred stock is, so to speak, "non-cumulative," which is understood to mean that the arrearages of one year cannot be paid out of the earnings of a subsequent year.[19]

§ 3. *Effect of a Guaranty of Dividends—Whether Absolute or Conditioned on being Earned.* — Notwithstanding what has been said at the commencement of this article, there is a difference of opinion upon the question whether a contract by which the shareholder becomes entitled to a dividend of a certain per cent. each year, or by which the company also guarantees the dividend, creates an absolute obligation on the part of the corporation to pay interest on the shares, or only an obligation to pay a preferred dividend in case there are profits which can be divided. There would seem to be no room for doubt on the question; and yet the courts have doubted upon it, and have, the writer thinks, gone wrong in deciding it. If the shares are entitled, we will say, to a preferred dividend of seven per cent., then the corporation must pay that dividend if there are profits which can be properly so applied, and to create this obligation the additional guaranty is not necessary. The rule of interpretation which makes the guaranty a mere guaranty of dividends in case there are profits out of which dividends can be declared, gives no effect whatever to that clause of the contract, and violates the rule that an instrument must be so interpreted, if possible, as to give effect to all its parts. The additional guaranty can only mean that the company undertakes that the dividend shall be payable in any event—in other words, it converts the certificate into an interest-bearing debenture. Where, in addition to the guaranty of interest at the rate named, the stock is payable in full on a dissolution of the corporation next after the payment of debts, there is no room for any hesitation in holding that the guaranty of interest is absolute and wholly independent of the question whether there are profits in any year whatever on which a dividend could be properly declared[20] for here the share certificate is in the nature of an interest-bearing debenture. But there are holdings to the effect that a general guaranty of dividends by a railroad company on its preferred stock is not a guaranty of payment in any event, but only in the event that the dividends are earned.[21] It has also been held that the holders of preferred stock or preference shares of a corporation, are entitled to dividends when there are profits out of which dividends may be declared, and not otherwise, although the resolution of the directors under which the stock is issued provides that a "semi-annual dividend of

[17] 2 Thomp. Corp. §§ 2266, 2268.

[18] Hazeltine v. Belfast, etc. R. Co., 79 Me. 411, 1 Am. Rep. 330.

[19] Belfast, etc. R. Co. v. Belfast, 77 Me. 445, 449; Hazeltine v. Belfast, etc. R. Co., *supra*. In Baile v. Hannibal, etc. R. Co., 1 Dill. (U. S.) 174, a scheme of preference was under consideration under which it was held that when the preferred stock has in any one year received its $7.00 per share, the common stock is entitled to receive $7.00 per share, if so much shall have been earned; and if there is any surplus beyond this, the two kinds of stock shall share it equally. Circumstances under which a dividend on preferred shares may be paid, although capital impaired: Cotting v. New York, etc. R. Co., 54 Conn. 156. Circumstances under which a subsequent owner the shares may claim reimbursements where his vendor has failed to claim his rights in certain years; Elkins v. Camden, etc. R. Co., 36 N. J. Eq. 296.

[20] Williams v. Parker, 136 Mass. 204.

[21] Miller v. Ratterman, 47 Ohio St. 141, 23 Ohio L. J. 416.

five per cent., payable in each year, shall be guaranteed by the company," and although the certificates of stock contain the recital "five per cent. semi-annual dividend guaranteed."[22] This conclusion is enforced by Mr. Justice Cooley in a train of specious reasoning, proceeding upon the view that the conclusion which would make such stock a debt and which would make the semi-annual guaranteed dividend merely interest, would place the preferred in antagonism to the general shareholder, and would thereby produce inharmony in the management of the corporation; since preferred shareholders would be interested in keeping it alive as long as they could sap its capital by the collection of the semi-annual dividends, while in case of its becoming a failing concern, the general shareholders would be interested in winding it up and distributing its capital among all the shareholders. Such a guaranty may, however have the possible effect of making the right to the dividends cumulative—that is, of making the profits of one year make up the deficiencies of the preceding years. At least one holding in an intermediate appellate court is found where the certificate stated that the stock was "entitled to dividends at the rate of 10 per cent. per annum, payable semi-annually, in New York, on the first days of June and December, in each year, out of the net earnings of said company; and the payment of dividends as aforesaid is hereby guaranteed." Here it was held that the holders of the stock were entitled to the guaranteed amount of dividends out of the net earnings whenever made, and were not restricted to the earnings of any year for the payment of dividends falling due that year.[23]

§ 4. *Preferred Stockholders not Entitled to Priority over Creditors.*—A preferred stockholder, whose contract merely entitles him to dividends out of profits in preference to ordinary stockholders cannot, by virtue of his contract, claim a preference over creditors; for any contract which gives him such a preference leaves him out of the category of shareholders and places him in that of preferred creditors. Stated in another way, when the scheme of preference is such that the status of the so-called preferred shareholder is really that of a shareholder, and not that of a creditor, he is of course entitled to no preference in winding up the company in the distribution of its assets over its creditors. He is still a member, and hence in a sense a debtor and not a creditor. Nor does the mere fact that he is entitled to a preference over other shareholders in respect of dividends where there are profits to divide, leave him out of this category and entitle him to such a preference in winding up.[24] His rights are to have his preferred dividend in case there is a surplus which can properly be divided among shareholders, and there can be no such surplus as long as debts of the corporation remain unpaid as they mature.[25] And creditors who surrender their debentures for preferred stock remit themselves to this position; for by so doing they cease to be creditors and become shareholders.[26]

§ 5. *Nor over Other Shareholders in Winding up.*—Nor does a mere right to a preference in receiving dividends out of profits give a right of preference over other shareholders in the distribution of the company's assets on a final winding up. The preferred shareholder is still a shareholder, and is entitled to whatever preference his contract gives him, and to no more.[27]

§ 6. *Rights of Preferred Shareholders a Question of Interpretation.*—An examination of the cases makes it plain that in most cases the questions which have arisen in respect of the rights of preferential stockholders are questions of interpretation, depending on the terms of the particular instruments, rather than general principles of law. Citations could be accumulated of cases depending upon particular states of fact, but to no useful purpose, because the law is a collection of principles and not facts.[28]

[22] Lockhart v. Van Alstyne, 31 Mich. 76, 19 Am. Rep. 156.

[23] Prouty v. Michigan, etc. R. Co., 4 Thomp. & C. (N. Y.) 233.

[24] *Re* London India Rubber Co, L. R. 5 Eq. 519; Griffith v. Paget, 6 Ch. Div. 511.

[25] Warren v. King, 108 U. S. 389; affirming s. c., 2 Fed. Rep. 36.

[26] St. John v. Erie R. Co., 22 Wall. (U. S.) 136; affirming s c., 10 Blatch. (U. S.) 271.

[27] Griffith v. Paget, 6 Ch. Div. 511. The separate assent of the preferred shareholders, as a class, is not necessary to an "arrangement" under § 12, of the English Company's Act, 1867. *Re* Brighton, etc. R. Co., 44 Ch. Div. 28.

[28] Such cases are: Totten v. Tison, 54 Ga. 139; Sullivan v. Portland, etc. R. Co., 4 Cliff. (U. S.) 212; Baile v. Hannibal, etc. R. Co., 1 Dill. (U. S.) 174; Culver v. Reno Real Estate Co., 91 Pa. St. 367. Interpretation of the phrase "dividends accruing:" Parks v. Automatic Bank Punch Co., 14 Daly (N. Y.), 424,

§ 7. *Remedies of Preferred Shareholders.*—The contractual right of preference in the distribution of dividends over the common shareholders would be delusive unless the law gave the preferred shareholder a substantial remedy to enforce such right. An action at law has been allowed against a corporation on a contract to make a dividend of its earnings;[29] and in a plain case of the breach of such a contract no reason is perceived why such an action would not lie. But this would not exclude the jurisdiction of a court of equity, which, in cases that might be supposed, would be more effective. There is no difficulty in supporting the jurisdiction of equity, on the theory that the refusal of such a dividend is a breach of trust on the part of the directors. The contract which gives the prefererd shareholders a right to the dividend out of the net earnings impresses any net earnings in the hands of the directors, for the particular year, with a trust in behalf of the preferred shareholders, to the extent required by the terms of the contract. If the directors refuse to perform that trust by making the distribution, a court of equity will, obviously, in a suit in which the parties in interest are made defendants, compel them to do so.[30] Where the dividends are not paid upon preferred stock in pursuance of the terms of a contract, the holders of such stock may maintain an equitable action to compel a specific performance of the contract and to restrain the payment of dividends on the common stock until the arrears of their preferred dividends have been paid.[31] "The cause of action," said Miller, J., "is of an equitable character, and the remedy demanded cannot be obtained by an action at law. It is not an action to recover the dividends alone, but to compel the defendant to do what is necessary and proper for the specific performance of the contract. * * * The plaintiffs pray that an account be taken, that the defendant be compelled specifically to perform the agreement and enjoined from declaring or paying any dividends upon the common or unpreferred stock of the corporation, until the holders of the guaranteed or construction stock are all paid. Without some action of the officers of the corporation, there is no power to pay the dividends; and as they are to be paid out of net earnings, this cannot be done in any other manner."[32] So, in Virginia it has been held that a suit in equity may be maintained by the holders of guaranteed stock to compel the corporation to allow them to participate, equally with the holders of the common stock, in any larger dividends declared in favor of the latter after the payment to the plaintiffs of the preferential or guaranteed dividends;[33] that such a suit is to be treated as a creditor's bill, in such a sense that the remedy accorded by the decree settling the rights of the parties, accrues in favor of all the guaranteed stockholders, whether parties to the suit or not; that a reference should be made to a commissioner to ascertain, state and report who are the other holders of guaranteed stock, and in what shares money dividends are coming to them under the decree settling the rights of the parties; and further, that proper steps should be taken for the allowance of counsel fees against the guaranteed stockholders not already represented by counsel.[34] An action to secure the application of future earnings of a corporation to the payment of dividends due holders of preferred stock, is properly brought by one of the holders of such stock on his own behalf, and on behalf of others having like grounds of complaint.[35] The

14 N. Y. St. Rep. 710. What are "interest dividends" payable "when able:" Barnard v. Vermont, etc. R. Co., 7 Allen (Mass.), 512; See also Cunningham v. Vermont, etc. R. Co., 12 Gray (Mass.), 411. Right to dividends on preferred stock under particular contracts: St. John v. Erie R. Co., 10 Blatchf. (U. S.) 271; Thompson v. Erie R. Co., 11 Abb. Pr. (N. Y.) 188, 42 How. Pr. (N. Y.) 68; *Re* Dicido Pier Co. (1891), 2 Ch. 355; Belfast, etc. R. Co. v. Belfast, 77 Me. 444. Rights of preferred shareholders against schemes of arrangement under English Railway Companies' Act: *Re* Neath, etc. Co. (1892), 1 Ch. 349.

[29] Bates v. Androscoggin, etc. R. Co., 49 Me. 491. Compare Taft v. Hartford, etc. R. Co., 8 R. I. 310, 5 Am. Rep. 575, which was an action of assumpsit.

[30] This was done in Hazeltine v. Belfast, etc. R. Co., 79 Me. 411, 1 Am. St. Rep. 330, 19 Am. & Eng. Corp. Cas. 456, 10 Atl. Rep. 328, 30 Am. & Eng. R. Cas. 528, 4 New Eng. Rep. 704. See also, Ashbury v. Watson, L. R. 30 Ch. 376, and New York, etc. R. Co. v. Nickals, 119 U. S. 296; (reversing s. c. 21 Blatchf. (U. S.) 177, and Nickals v. New York, etc. Ry. Co., 15 Fed. Rep. 575); McIntosh v. Flint, etc. R. Co., 32 Fed. Rep. 350, 1 Rail. & Corp. L. J. 299; Boardman v. Lake Shore, c. R. Co., 84 N. Y. 157.

[31] Boardman v. Lake Shore, etc. R. Co., 84 N. Y. 157.

[32] *Ibid.* p. 179.

[33] Gordon v. Richmond, etc. R. Co., 78 Va. 501.

[34] Gordon v. Richmond, etc. R. Co. (on second appeal), 81 Va. 621.

[35] Prouty v. Michigan, etc. R. Co., 4 Thomp. & C. (N. Y.) 230, 241. The court cite, as supporting the propriety of bringing the action in this form, Story

stockholders not joined as plaintiffs are not necessarily parties defendant; the corporation binds them by representation.[36] Upon the hearing of such an action, for the purpose of showing authority for the issue of the stock, the book of minutes, containing resolutions of the directors, authorizing the issue are properly admitted in evidence.[37] Where preferred stockholders seek a remedy in equity, it may be found that they have lost their rights by laches,[38] just as common stockholders may, in consequence of their laches, lose their right to undo a scheme by which preferred shares have been issued.[39]

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Eq. Pl. (7th ed.), §§ 49-103; McKenzie v. Lamereux, 12 Barb. (N. Y.) 516; Bouton v. Brooklyn, 15 *Id.* 375; Hammond v. Hudson River, etc. Co., 20 *Id.* 378; Cady v. Cogner, 19 N. Y. 256.

[36] Prouty v. Michigan, etc. R. Co., 4 Thomp. & C. (N. Y.) 230.

[37] Boardman v. Lake Shore, etc. R. Co., 84 N. Y. 157.

[38] Sullivan v. Portland, etc. R. Co., 4 Cliff. (U. S.) 212.

[39] 2 Thomp. Corp. § 2153.

STATUTE OF FRAUDS—SALE OF LAND—MEMORANDUM—DEED.

KOPP V. REITER.

Supreme Court of Illinois, March 31, 1893.

An undelivered deed which does not recite the terms of the contract of sale, and which is in no way connected with any written contract signed by grantor, or by any one under authority from him, is not a sufficient "memorandum or note" of the contract of sale to satisfy the statute of frauds.

MAGRUDER, J. (after stating the facts): Under the facts, did Mrs. Reiter, the owner of the lot, make any such contract for its sale and conveyance as a court of equity will compel her to perform? Section 2 of the statute of frauds provides as follows: "No action shall be brought to charge any person upon any contract for the sale of lands, etc., * * * unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party." 1 Starr & C. Ann. St. ch. 59, § 2, p. 1192. It cannot be contended here that there has been any such part performance of a parol contract by payments, possession, and improvements as will take the case out of the statute of frauds. The purchaser, Kopp, never took possession of the lot, nor made any improvements upon it. The only payment he made was that of the earnest money, $250. This amount, however, was not paid to Mrs. Reiter, but to Croutkite & Co., who never had any authority from her, written or otherwise to make sale of the lot, or to take any other steps in regard to it. We have held in a number of cases that, in order to ascertain what sort of writing is sufficient to meet the requirements of the statutes as above quoted no form of language is necessary, if only the intention can be gathered, and that any kind of writing, from a solemn deed down to mere hasty notes or memoranda in books, papers, or letters, will suffice, but that the writings, notes, or memoranda must contain on their face, or by reference to others, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the property to render it capable of being identified from other property of like kind, together with the terms, condition (if there be any), and price to be paid, or other consideration to be given; and such writing, note or memorandum must be signed by the party to be charged, or, if signed by an agent, the authority of such agent must be in writing, signed the party to be charged, and the contract or memorandum or note thereof made by the agent must also be in writing, and signed by him. McConnell v. Brillhart, 17 Ill. 354; Cossitt v. Hobbs, 56 Ill. 231; Wood v. Davis, 82 Ill. 311; Albertson v. Ashton, 102 Ill. 50; Chappell v. McKnight, 108 Ill. 570; Lasher v. Gardner, 124 Ill. 441, 16 N. E. Rep. 919. The only writing ever signed by Mrs. Reiter in this case was the warranty deed which she executed on or about January 7, 1891, and which remained in the hands of her husband, and was never delivered to Kopp, or to Vierling or Hammond. We do not think that this deed can be regarded, under the facts disclosed by the record, as such a memorandum or note of a contract for the sale of the land as is sufficient to take the case out of the statute of frauds. The contract of December 20, 1890, was executed by and between Mr. Reiter and the appellant, Kopp, but not by Mrs. Reiter, the owner of the lot. She gave her husband no written authority to act as her agent for the sale of the lot, or to sell it, or to sign any contract for the sale of it. We think that the findings of the master, to whom the cause was referred, and whose report was confirmed by the court below, are sustained by the evidence. He finds in his report that. before said contract was executed, Mrs. Reiter was not cousulted about it, and did not consent to it, and did not even give her husband any parol authority to sell the lot. The testimony shows that she was opposed to selling the lot, and reluctantly executed the deed at the request of her husband. Although he informed her of the execution of the contract after he had signed it, yet it was never shown to her, and she never saw it until the hearing of the cause. The master has found, and the evidence shows, that the deed was not executed with reference to the previous written contract between Reiter and Kopp, but with the understanding that Mr. Reiter was to deliver it upon receiving $3,000 in money and a note and trust deed for $2,000. The deed simply purported to convey the premises from the grantors to the grantee for a consideration of $5,000, but it did

not recite the terms of the contract, or in any manner refer to the contract. Counsel for appellant disclaim any reliance upon the undelivered deed as a conveyance of title, but contend that it is such written evidence of the contract of sale as satisfies the statute of frauds, whose object and meaning "is to reduce contracts to a certainty, in order to avoid perjury on the one hand (by the setting up of parol evidence, which is easily fabricated), and fraud on the other," (Welford v. Beazely, 3 Atk. 503); that the non-delivery of the deed, regarded as such written evidence, is immaterial; that it is immaterial whether Mrs. Reiter did, or did not, intend to charge herself thereby; and that the deed was an admission in writing of what the contract was. It is true that an undelivered deed is sometimes resorted to in order to help out the requirements of the statute of frauds, but it can hardly be said that the circumstances under which such a deed can be so used are disclosed by the facts in the present record. The language of the statute is, "some memorandum or note thereof." The word "thereof" refers back to the word "contract." There must be some memorandum or note in writing of the contract. Hence, if an undelivered deed executed by the owner can be regarded as meeting the requirements of the statute, it must be a memorandum or note of the contract, or, in other words, must refer to the terms and conditions of the contract.

In Cagger v. Lansing, 43 N. Y. 550, it is said: "The counsel * * * insists that the deed executed by the intestate, and delivered in escrow, is a contract for the sale of the land executed by the intestate. This position cannot be sustained. The deed purports to be a conveyance of all the intestate's interest in the premises, for a consideration therein expressed of $1,000 but is wholly silent as to the terms of the contract pursuant to which it was made." In Campbell v. Thomas, 42 Wis. 437, it was held that one who had deposited a deed with a third person, with directions to deliver it to the grantee on the happening of a certain event, but had made no valid executory contract to convey the land, could revoke the directions to the depositary, and recall the deed at any time before the conditions of the deposit had been complied with, provided those conditions were such that the title did not pass at once to the grantee upon delivery of the deed to the depositary; and it was there said: "If a person, who has made a parol agreement to sell land, sign an instrument in the form of a conveyance of such land to the vendee, and deposit it in escrow, if such instrument contains the terms of the parol agreement including the consideration, it is a sufficient compliance with the requirements of the statute of frauds." In Swain v. Burnette, 89 Cal. 564, 26 Pac. Rep. 1093, it was held that an undelivered deed, executed in pursuance of an oral agreement of sale, cannot be regarded as a sufficient memorandum to satisfy the statute of frauds, unless it is shown to have contained a memorandum of the oral agreement. Freeland v. Charmley, 80 Ind. 132; Parker v. Parker, 1 Gray, 409; Overman v. Kerr, 17 Iowa, 485; Cannon v. Cannon, 26 N. J. Eq. 316; Johnston v. Jones, 85 Ala. 286, 4 South. Rep. 748. Many of the cases cited as authority for the position that a deed executed by an owner of land, but not delivered, is a sufficient memorandum of a contract of sale, under the statute, will thus be found, upon examination to refer to deeds containing the terms of the contract. In the case at bar, however, as has already been stated, the deed executed by Mrs. Reiter and her husband was a simple conveyance of the lot for a consideration of $5,000, and was silent as to the terms of the contract of December 27, 1890. Where the owner of land has signed a written contract of sale, or some writing amounting to such a contract, but has failed therein to properly describe the property, a deed executed by him, but not yet delivered, may be looked to as a part of the transaction, and may be made to aid the prior agreement, and secure its enforcement, by supplying the defect in such description. Thus, in Jenkins v. Harrison, 66 Ala. 345, to which reference is made by counsel for appellant, a memorandum in writing, purporting to contain the terms of a contract for the sale of land, and signed by both of the parties, failed to describe the property with the certainty and definiteness, required to a specific performance, but deeds, inoperative for want of delivery, were executed by the parties a few days afterwards, which did correctly describe the land; and it was held that such undelivered deeds, and the memorandum signed by the parties, might, when taken together, satisfy the requisitions of the statute of frauds, the court saying: "When the memorandum * * * is taken and read, as it must be, in connection with the deeds subsequently executed, there is no doubt or uncertainty as to the terms of the contract for the sale of the lands. True, the deeds do not expressly refer to the memorandum, but they were all executed as parts of a single transaction, between the same parties, having reference to the same subject-matter." In Work v. Cowhick, 81 Ill. 317, property was struck off to appellant as the highest bidder at an administrator's sale, and the administrator's deed of the land, and a note signed by the purchaser, in which she promised to pay to the administrator the purchase money "for land purchasedd by Elizabeth Worth this day at administrator's sale," were left with a third person to be held until the purchaser should obtain personal security on the note, and execute a mortgage, at which time the deed was to be delivered. It was held, in a suit by the administrator against the purchaser for a failure to carry out the sale, that the making of the deed and the signing of the note might be regarded as one transaction, and that together they constituted such proof as amounted to a compliance with the statute of frauds; the description in the deed indicating what land was referred to by the imperfect de-

scription in the note. So, in Wood v. Davis, *supra*, written authority to an agent to sell land, and the terms of a contract of sale were embodied in letters written by the owner, who also sent to the agent an executed deed to be delivered, but which was never in fact delivered, and when, after refusal by the agent to consummate the trade, suit for damages was brought by the purchaser against the owner, it was held that such a contract was established as took the case out of the operation of the statute of frauds, and that, although the memoranda contained no description of the land. the description in the undelivered deed could be referred to to supply the defect.

It is manifest, however, that all these cases differ from the case at bar. Here, the undelivered deed executed by Mrs. Reiter cannot be used to supplement, or supply any defect in, a prior contract of sale, or a prior note or memorandum of a contract of sale, because there was no prior contract or note or memorandum which she had signed, or to which she was a party, or which she had authorized to be made. The contract of sale, therefore, entered into, was made by Mr. Reiter, without either written or parol authority from her. Nor can her undelivered deed, subsequently destroyed, be regarded as a ratification of the agreement made by her husband, because it was not made in pursuance of that agreement, or to carry it out, but without any reference to it. Where, as is the case here, the owner of land, without making a valid executory contract to convey it, deposits a deed of it with a third person, to be delivered to the grantee upon certain terms, he may cancel the instructions given to such third person and recall the deed, at any time before the specified terms have been complied with; nor can such deed, invalid as a conveyance for want of delivery, be considered as a memorandum in writing, signed by the owner, agreeing to convey the land therein described, so as to authorize a decree of specific performance. A deed which has not been delivered is not, by its own force, and aside from any contract to which it may be related, a sufficient writing to meet the requirements of the statute of frauds. For these reasons we think that the decree of the Circuit Court was right, and the same is accordingly affirmed.

NOTE.—The principal case is an excellent illustration of the well established general rule that to be sufficient under the statute of frauds the "written memorandum" must contain the essential terms of the contract. It must (1) name the parties; (2) identify the property; (3) state the considerations of sale; (4) enumerate the terms of payment, and whatever else may be regarded as an essential part of the contract. Of course, it is not necessary that the memorandum should itself set out each of these matters. If it contains some reference by which they may be identified and established it will be sufficient within the statute.

1. *Names of Parties.*—It is manifestly necessary that the memorandum should should show who are the parties to the contract. The decision of Lord Mansfield in the leading case of Champion v. Plummer, 1 Bos. & P. N. R. 252, holding insufficient a memorandum duly signed by the vendor, the defendant but in which the name of the purchaser nowhere appeared, seems not to have been departed from either in this country or in England. Browne, Statute of Frauds, § 373; Wood on Statute of Frauds, §§ 345, 354. Thus, in a recent English case the proposed purchaser of land signed a document: "I hereby agree to pay in the usual way for the tenant rights (the landlord to be considered an out-going tenant according to the custom of the county)." The vendor's name was not mentioned in the document. It was held to be an insufficient memorandum, and that a subsequent letter from the purchaser to vendor's solicitors asking that a portion of the purchase money might remain on mortgage concluding "let me know by return of post, and then Mr. Coombs could sign off the deeds. . . . I should like a copy of our agreement," did not cure the defect. Coombs v. Wilkes [1891], 3 Ch. 77. See also, McGovern v. Hern, 26 N. E. Rep. 861; Lewis v. Wood, 26 N. E. Rep. 862; Mentz v. Newwitter, 122 N. Y. 491; Repetti v. Maisak, 6 Mackey, 366.

2. *Description of Property.*—While it is not essential that the property should be very precisely described in the memorandum, for parol evidence is admissible to identify it, there must be, either in the memorandum or note itself, or by reference to some other writing, the means of identifying the property. The admissibility of parol evidence does not extend to the intention of the person sought to be charged but only to assist the court in determining the meaning of the language used. Wood on Statute of Frauds, § 353. Thus a memorandum reciting the receipt of money from a purchaser "on a bargain between me and him on my seventh part interest in real estate as deed will show," was held insufficient to identify the land. Voorheis v. Liting, 22 S. W. Rep. 80. And a description of land bought as "adjoining the McKeby" land was held insufficient where it appeared that there was a controversy between the parties as to which of two tracts, both answering the description, was meant, which could only be settled by parol evidence. Jones v. Tye (Ky.), 20 S. W. Rep. 388. So a receipt: "James Harris has paid me $20 on his land. Owes me six more on it. A. P. Galloway" was held too indefinite to authorize the admission of parol evidence to locate the land. Lowe v. Harris (N. C.), 17 S. E. Rep. 539. See also, Fox v. Courtney (Mo.), 20 S. W. Rep. 20; Humbert v. Brisbane, 25 S. C. 526; Repetti v. Maisak, 6 Mackey, 366; Wilstack v. Heyd 122 Ind. 574; Mellon v. Davison, 123 Pa. St. 298, 16 Atl Rep. 431; Brockaway v. Frost, 40 Minn. 155; Taylor v. Allen, 40 Minn. 433; Breckenridge v. Crocker, 78 Cal. 729; Phillips v. Swank, 13 Atl. Rep. 712; Morrison v. Dailey, 6 S. W. Rep. 426. But on the other hand, a memorandum that a certain person has this day sold his homeplace and storehouse to a named person has been held to sufficiently describe the property. Henderson v. Perkins (Ky.), 21 S. W. Rep. 1035. Where the memorandum contained all the essentials of the contract except a description of the property, and afterwards in receipting for a check the vendor acknowledged it, as "on account of the purchase money for the F estate," it was held that parol evidence was admissible to explain the circumstances under which the letter was written, to connect it with the memorandum; and that the two documents so connected, constituted a sufficient memorandum within the statute. Oliver v. Hunting, L. R. 44 Ch. Div. 205. See also Bayne v. Wiggins, 139 U. S. 210; Falls of Neuse Mfg. Co. v. Hendricks, 106 N. C. 485; Ryan v. United

States, 136 U. S. 68; Francis v. Barry, 37 N. W. Rep. 353.

3. *Consideration.*—Only in those States where the statute expressly requires the consideration to be stated, is it always necessary for the matter of price to be set out in the memorandum. But, where there is no statutory provision, if the price is actually agreed upon by the parties when they enter into the verbal agreement, it becomes a part of the essence of the contract and must be embodied in the memorandum under the rule that it should contain all the essentials. Wood on Statute of Frauds, § 351. Thus an indorsement on a land office certificate, signed by the holder saying that he had sold to M "all his right, title and interest to the within described land for value received," was held insufficient as failing to state the price of land, where a price was actually agreed upon. Sayward v. Gardner, 5 Wash. St. 247, 31 Pac. Rep. 761. See also, Hanson v. Marsh, 40 Minn. 1.

4. *Terms of Payment.*—When these constitute a part of the verbal agreement entered into between the parties, they must be made to appear in the written memorandum. Of this rule the principal case is a happy illustration. The deed which is there relied upon was simply a conveyance of the property, for the recited consideration of $5,000, while the contract as entered into by defendant's husband involved a payment of $250 earnest money $2,750, upon making title to the vendee, and the further deferred payment of $2,000 secured by the vendee's deed of trust on the premises. If the contract in the principal case had been for a sale of $5,000, cash, the deed in question would have been a sufficient memorandum, under the authority of Campbell v. Thomas, 42 Wis. 437. So it has been very recently held that a memorandum setting out the terms of payment as "one-third cash; notes to be executed for the balance" was held insufficient because there was nothing to show the number of notes to be given, the interest thereon or date of payment. Nelson v. Shelby Mfg. & Imp. Co., 11 South. Rep. 695. And where the memorandum stated the price (cash), it was held to be insufficient because it referred to additional terms agreed on, which were not evidenced in writing but left in parol. Lester v. Heidt, 86 Ga. 226, 12 S. E. Rep. 214.

WILLIAM L. MURFREE.

CORRESPONDENCE.

PAROL TRUSTS AND THE STATUTE OF FRAUDS.

To the Editor of the Central Law Journal:

Referring to your leading article on the subject, "Parol Trusts and the Statute of Frauds" in your issue of September 29th, ult., page 255, while admitting that the case there discussed is a hard one upon the grantor, and a great moral wrong on the part of the grantee, still I wish to inquire, 1st, whether or not you intend to convey the idea that when the original transaction is free from the taint of fraud, or imposition, and when the parol agreement, which, in that case, was sought to be enforced, was purposely excluded from the conveyance, fraud can be imputed to the grantee in said conveyance, and a trust fastened upon the property for a subsequent violation or repudiation of the parol agreement, between the parties?

2d. If so, what becomes of the statute of frauds, which declares that no such agreements or trust shall be made or proved by parol, if such cases as the one discussed by you are withdrawn from the operation of the statute because of such violation or repudiation?

3d. How can a trust such as you contend for exist when the statute expressly declares that such a trust shall not be made, and how can a court enforce such a trust without parol proof of its existence, which the statute declares shall not be made?

4th. Can a trust be raised by the breach of a mere verbal promise on the part of the grantee, such as was made by the grantee in the case under discussion, and is the mere breaking or breach of an oral agreement, standing alone, though a moral wrong, sufficient to establish that fraud, in procuring the title, which is requisite to render the grantee a trustee *ex maleficio*.

5th. It does not appear from the case discussed by you that the grantee used any fraud or deceit, in obtaining her title to the real estate, but the contrary appears, or is implied, could the court under that state of facts have rendered any other judgment or decree than the one it did render without virtually abrogating the statute? If your consider these questions worthy of a reply, by giving your views of the matters inquired about, you will greatly oblige,

"A SUBSCRIBER."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMINISTRATION — Removal of Administrator.—Rev. St. 1881, § 2229, provides that if several persons, of the same degree of kindred, are entitled to administration, letters may be granted to one or more of them, "but males shall be preferred to females:" Held that, in a petition by a son of decedent for the re-

moval of a daughter from the office of administrator, and the appointment of himself to that position, the allegation that petitioner has "the lawful right to be preferred as administrator of said estate" is insufficient, without showing that he is otherwise qualified to hold the office.—AUDIS v. LOWE, Ind., 34 N. E. Rep. 850.

2. ADMIRALTY — Costs—Set-off.—An Appellate Court, in an admiralty case, reversed a decree in favor of the libelant, and directed a decree in his favor for a smaller sum, with the costs of the District Court, but condemned him to pay the costs of the Appellate Court: Held, that costs in the Appellate Court could not be set off against the unpaid costs of the District Court, so as to prevent the officers of the latter from collecting the sums due them from the claimant.—AIKEN v. SMITH, U. S. C. C. of App., 57 Fed. Rep. 423.

3. ADMIRALTY PRACTICE — Revenue Laws.—The United States is entitled to but one decree of forfeiture against a vessel for several past violations of the revenue laws, and where a vessel has been once libeled for several such violations, and released on bond she is not thereafter subject to a second seizure for alleged violations committed during the same period as those for which she has already been seized.—THE HAYTIAN REPUBLIC, U. S. D. C. (Oreg.), 57 Fed. Rep. 508.

4. APPEAL—Requiring New Bond.—When it is made to appear that the surety upon an appeal bond has become insufficient, the court having jurisdiction of the appeal may order the giving of a new bond with sufficient surety as a condition to the maintenance of the appeal, and in default of compliance with such order, may dismiss the appeal.—WILLIAMS v. WILLIAMS, Colo., 34 Pac. Rep. 285.

5. APPEAL BOND — Forcible Detainer.—An appeal bond in forcible detainer proceedings, that is conditioned for payment of all rent due or to become due, creates a liability for taxes not paid by the tenant, where the lease provides that he shall pay such taxes as part of the rent reserved therein.—NEAGLE v. KELLY, Ill., 34 N. E. Rep. 947.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignment for benefit of creditors, of the goods, chattels, and property of the assignor, does not pass to the assignee a claim of the assignor against a decedent's estate for commissions as executor.—IN RE MULLIGAN'S ESTATE, Penn., 27 Atl. Rep. 398.

7. ASSIGNMENT OF CAUSE OF ACTION.—A claim for damages to property may, under our statute, be assigned so as to vest in the assignee the right of action in his own name. The general rule is that assignability and descendibility go hand in hand.—HOME INS. CO. OF NEW YORK v. ATCHISON, T. & S. F. R. CO., Colo., 34 Pac. Rep. 281.

8. ASSIGNMENT OF CONTRACT—Fraud as to Creditors.—The assignment of a contract with a city will not be set aside on the ground that it is fraudulent as to the assignor's creditors, where assignee, who was surety on the assignor's bond to the city for faithful performance, testifies without contradiction that he took the assignment solely to protect himself from loss, the assignor having been unable to perform the contract, and no evidence of fraud is given except an attempt to show that the assignor was insolvent at the time of the assignment.—ALAMO CEMENT CO. v. CITY OF SAN ANTONIO, Tex., 23 S. W. Rep. 449.

9. ATTACHMENT—Action on Bond.—In an action on a bond given to secure release of attached property, conditioned for liability in case judgment was rendered against defendant in attachment, a finding that a judgment was not rendered is not warranted where, in the record of the attachment suit subsequent to a judgment of non suit, appears a judgment for plaintiff therein, as to the legality of which there is no evidence, there being a presumption in its favor.—MOORE v. MOTT, Cal., 34 Pac. Rep. 345.

10. ATTACHMENT—Incomplete Levy.—There can be no recovery for the malicious suing out of a writ of attachment against real estate without probable cause, when it does not appear that it was fully executed, as required by Code Civil Proc. § 542, and that a copy of the writ, description of the property, and notice were left with the occupant of the property, or posted thereon, as well as filed with the recorder of the county.—MASKELL v. BARKER, Cal., 34 Pac. Rep. 340.

11. ATTACHMENT—Non-residence—Domicile.—Though one's domicile may be in another State, he may reside in this State, and in such case an attachment will not lie against him as a non-resident.—BROWN v. CRANE, Miss., 13 South. Rep. 855.

12. BANKS—Savings Banks.—Laws 1882, ch. 409, § 283, making it unlawful "to advertise or put forth a sign as a savings bank, or in any way to solicit or receive deposits as a savings bank," does not forbid the carrying on of a business substantially as that of a savings bank, but it only forbids the conducting of such business under a claim or pretense of being a savings bank.—PEOPLE v. BINGHAMTON TRUST CO., N. Y., 34 N. E. Rep. 898.

13. BANKS—Savings Banks.—One who seeks to charge as a partner a person who has purchased stock in an organized bank doing business as a savings bank has the burden of proving that the bank was a partnership, and not even a *prima facie* case is made by evidence that the bank was organized under the name of the Home Savings Bank, with a president, cashier, and board of directors; that its certificates of stock recited organization under the laws of the State, and the division of its capital into shares of $100 each, and that its profits were distributed in the shape of dividends on stock.—IN RE GIBB'S ESTATE, Penn., 27 Atl. Rep. 383.

14. BANKS AND BANKING—National Banks—Taxation.—Rev. St. § 5219, prohibits an adverse discrimination by a local government in the valuation of national bank stock for assessment, as compared with the assessment by the same government for the same year of other moneyed capital invested so as to make a profit from the use thereof as money.—PUGET SOUND NAT. BANK OF SEATTLE v. KING COUNTY, U. S. C. C. (Wash.), 57 Fed. Rep. 433.

15. BONDS—Escrow.—A bond cannot be delivered to the obligee as an escrow, to take effect on a condition not appearing on its face, but the delivery must be to a third person; otherwise, it becomes absolute.—EASTON v. DRISCOLL, R. I., 27 Atl. Rep. 445.

16. CARRIERS—Passengers.—It is the duty of a person about to take passage on a railroad train to inform himself when, where, and how he can stop, under the regulations of the railroad company; and if he makes a mistake, not induced by the company, against which ordinary care in this respect would have protected him, he has no remedy against the company for the consequences.—TEXAS & P. RY. CO. v. LUDLAM, U. S. C. C. of App., 57 Fed. Rep. 481.

17. CONSTITUTIONAL LAW—Judges—Terms of Office.—Under Const. art. 7, § 161, which vests the judicial power of the State in the Supreme Court and in the Circuit Courts, and section 169, which fixes the term of a circuit judge at six years, if he so long behave well, the legislature cannot, by virtue of the power to divide the State into judicial circuits vested in it by section 169, remove a circuit judge from office by attaching the entire territory constituting his circuit to another circuit, and empowering the judge of the other circuit to act as judge for the new circuit.—STATE v. FRIEDLEY, Ind., 34 N. E. Rep. 872.

18. CONSTITUTIONAL LAW — Limitation of State Indebtedness.—Act April 17, 1893, providing for payment of materials and labor in the completion of a State canal by certificates of indebtedness to be issued by the State auditor, which may be accepted by the State in payment for carriage of water or for lands, but shall not be a claim against the State, cannot violate the constitutional provision limiting State indebtedness, as it permits of no such indebtedness.—IN RE CANAL CERTIFICATES, Colo., 34 Pac. Rep. 274.

19. CONSTITUTIONAL LAW — Mortgages — Payment of Taxes on Mortgage.—Under Const. art. 13, § 5, declaring that contracts obligating a debtor to pay a tax on money loaned, or on any mortgage, shall be void as to any interest specified therein and as to such tax, a provision in a mortgage that, in case of foreclosure, the mortgagee may include therein all payments made by the mortgagee for "taxes of this mortgage, or the money hereby secured," is void —HARRALSON v. BARRETT, Cal., 34 Pac. Rep. 342.

20. CONSTITUTIONAL LAW — Questions by Governor.— Under the constitutional provision requiring the Supreme Court to answer questions propounded by the legislature and governor, a question as to the priority of appropriations where their aggregate exceeds the constitutional limitation, involving claims of private parties against the State, should not be answered, as this would be a mere *ex parte* adjudication, in violation of Const. art. 2, § 25, providing that no one shall be deprived of property without due process of law.—IN RE PRIORITY OF LEGISLATIVE APPROPRIATIONS, Colo., 34 Pac. Rep. 277.

21. CONSTITUTIONAL LAW — State Board of Medical Examiners. — Const. art. 8, § 11, which provides that the District Court "shall have appellate jurisdiction in all cases arising in justice's and inferior courts, in their respective districts, as may be provided by law, and consistent with this constitution," does not limit the appellate jurisdiction of such court to appeals from justices' and inferior courts only, and prohibit the legislature from providing for appeal to the District Court by the party aggrieved by the action of the State board of medical examiners in revoking the license of a physician to practice medicine and surgery.—STATE v. DISTRICT COURT, Mont., 34 Pac. Rep. 298.

22. CONSTITUTIONAL LAW—Title of Act — Mortgage.— Act June 5, 1889, entitled "An act to regulate the foreclosure of chattel mortgages on household goods, wearing apparel and mechanic's tools," provides in section 1 that such mortgages can only be foreclosed by suit in a court of record, and, in section 2, that no chattel mortgage executed by a married man on household goods shall be valid unless joined in by his wife: Held, that the second section, being germane to the subject expressed in the title, was not obnoxious to Const. art. 4, § 13, providing that no act shall embrace more than one subject, which shall be expressed in its title.—GAINES v. WILLIAMS, Ill., 34 N. E. Rep. 934.

23. CONTRACTS — Consideration — Modification.—February 1st plaintiff agreed to deliver defendant so much wood, at an agreed price per cord, by April 1st; plaintiff not to be responsible for the railroad's failure to supply cars, nor for delays beyond human control. No cars were furnished till April 10th or 11th. March 28th plaintiff wrote to defendant that, in view of the wages he had then to pay, he must ask for a better price for the wood. Defendant answered that he would pay him a certain advanced price per cord, and requested him to hurry his shipments: Held, that the modification of the contract was not without consideration.—FOLEY v. STORRIE, Tex., 23 S. W. Rep. 442.

24. CONTRACT—Construction — Mortgage.—A railroad company bought land from a mortgagee in possession with notice that the mortgagor claimed the right to redeem. The mortgagee gave the company an agreement that if redemption was made he would repay the company the amount paid by it for the land, with interest. Afterwards the railroad company condemned the land, and deposited with the county treasurer the compensation awarded therefor on the very day that the mortgagor redeemed the land and paid the redemption money to the railroad company: Held, that the mortgagee was only liable to the company for interest up to the date of the deposit, since the railroad company, as equitable assignee of the mortgage, was entitled to retain that part of the compensation representing the mortgage debt, and need not have deposited it with the county treasurer.—UNION MUT. LIFE INS. CO. v. CHICAGO & W. I. R. CO., Ill., 34 N. E. Rep. 948.

25. CONTRACT — Counterclaim. — In an action for a breach of a contract of employment, defendants alleged that plaintiff violated the contract by leaving their employ during a season when his services were most needed, by which defendants "were damaged in the sum of $200:" Held, that the allegations constitute a counterclaim which is good on demurrer.—BLANEY v. POSTAL, Ind., 34 N. E. Rep. 849.

26. CONTRACTS—Reservation of Right to Terminate.— Ordinarily, where the right to terminate a contract on notice is reserved in the instrument itself, without fraud or mistake, and with the actual knowledge and consent of all the parties thereto, such reservation is valid, and the exercise thereof will be enforced by the courts, if not contrary to equity and good conscience. —MORRISSEY v. BROOMAL, Neb., 56 N. W. Rep. 383.

27. CONVERSION — Exemplary Damages. — A petition for the value of coal shipped to and used by defendant, alleging that the shipment was to plaintiff's order, plaintiff drawing his draft on defendant for the value thereof, with bill of lading attached, on which was indorsed. "Delivered to" S (defendant), that the draft was presented, and not paid, but that defendant took possession of the coal, and appropriated it to its use, without plaintiff's consent,—states an action in tort for conversion, in which exemplary damages can lie, provided the conversion was attended with circumstances of fraud, malice, or wanton regard of plaintiff's rights.—SAN ANTONIO, & A. P. RY. CO. v. KNIFFIN, Tex., 23 S. W. Rep. 457.

28. CORPORATIONS — Foreign Corporations. — The statute of 1887, relating to foreign corporations, having been declared unconstitutional, there was from its date, until the act of 1889 went into operation, no effective statute concerning foreign corporations, and they were therefore on an equal footing with domestic corporations during such period.—LYTLE v. CUSTEAD, Tex., 23 S. W. Rep. 451.

29. CORPORATIONS — Individual Liability of Stockholders.—Under the provision of the Kansas constitution that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder and such other means as shall be provided by law," stockholders of corporations organized under the laws of Kansas are individually liable to corporate creditors to an amount equal to their stock, the constitutional provision being self-executory.—FOWLER v. LAMSON, Ill., 34 N. E. Rep. 932.

30. CORPORATIONS—Stockholders — Limitation of Actions.—Though under the general rule, as expressed in the title of the statute of limitations (Code Civil Proc. §§ 312-363), actions can be commenced within the prescribed periods "after the cause of action has accrued," section 359 declares that the title does not affect actions against stockholders of a corporation to enforce a liability created by law, but that such actions must be brought within three years after "the liability was created," and therefore an action against a stockholder to enforce his liability for a debt of the corporation cannot be brought after three years after the debt was created, even though no cause of action may have accrued.—HUNT v. WARD, Cal., 34 Pac. Rep. 335.

31. CRIMINAL EVIDENCE — Photographs.—On a trial for larceny of money from a bank, alleged to have been committed by defendant and two confederates, photographs of men recognized by the bank officials as being the ones who were in the bank when the robbery was committed, one of which is a likeness of defendant, and the other two of which are likenesses of persons recognized by others as his companions on the day of the robbery, are admissible in evidence, without preliminary proof that the photographs are correct representations of defendant and his confederates. — COMMONWEALTH v. CONNORS, Penn., 27 Atl. Rep. 366.

32. CRIMINAL LAW — Carrying Weapons — Officers.—Sheriffs and constables have not the absolute right, because of their office, to carry weapons at all times, since Act 1887, ch. 30, § 10, provides that sheriffs, constables, and other officers "may carry weapons in the legal discharge of the duties of their respective offices, when the same may be necessary, but it shall be for the court or jury to decide from the evidence whether such carrying of weapons was necessary or not, and for an improper carrying or using deadly weapons by an officer, he shall be punished as other persons are punished." — GUYSE v. TERRITORY, N. Mex., 34 Pac. Rep. 295.

33. CRIMINAL LAW—Larceny.—A person who participates in planning a felonious taking of money, and who by agreement is to share in the booty, which plan is successfully carried out, is guilty of larceny, though the money is recovered before division is made, and he in fact receives none of it. — COMMONWEALTH v. HOLLISTER, Penn., 27 Atl. Rep. 386.

34. CRIMINAL TRIAL — Witness—Cross-examination.—The rule is well settled that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination, and if he wishes to examine him as to other matters he must make the witness his own. But this rule permits an inquiry on cross-examination into all the facts and circumstances connected with the matters of the direct examination.—WILLIAMS v. STATE, Fla., 13 South. Rep. 834.

35. DEED — Construction — Reservation. — A general warranty deed in the statutory form contained, after the description, the following clause: "The grantor, C, hereby expressly excepts and reserves from this grant all the estate in said lands, and the use and occupation, rents and proceeds thereof, unto himself during his natural life." The instrument was acknowledged, delivered, and recorded 10 years before the grantor's death: Held, that the exception did not give the instrument a testamentary character, which made necessary its attestation and probate in accordance with the statute of wills.—CATES v. CATES, Ind., 34 N. E. Rep. 959.

36. DEED — Reformation. — Equity will not reform instruments which express the intention of the parties at the time they are made, based on the knowledge then possessed by them, though their intentions would have been different if they had been better informed.—WISE v. BROOKS, Miss., 13 South. Rep. 836.

37. ELECTIONS AND VOTERS—Ballot Law—Nomination Certificate.—A certificate of nomination, required to be filed by the Montana ballot law (section 4), which is regular upon its face, and filed with the proper officer, is *prima facie* evidence of the nomination of the person so certified.—STATE v. BENTON, Mont., 34 Pac. Rep. 301.

38. ESTOPPEL—Corporation — Pleading.—The maker of a note is estopped from denying that the payee is or was a corporation, by his having dealt with it as such, and received the consideration of the note.—BANK OF SHASTA v. BOYD, Cal., 34 Pac. Rep. 337.

39. FEDERAL COURTS — Jurisdiction. — A proceeding by receivers of a railroad against State railroad commissioners for relief against alleged unjust and unreasonable rates for freight transportation established by such commissioners, is not a proceeding against the State, within Const. U. S. Amend. 11, inhibiting the exercise of jurisdiction by Federal Courts in suits brought against one of the United States by citizens of another State.—CLYDE v. RICHMOND & D. R. CO., U. S. C. C. (S. Car.), 57 Fed. Rep. 436.

40. FEDERAL COURTS — Jurisdiction — Citizenship.—Under the provision of the judiciary act of 1887-88, that the Circuit Courts shall not have jurisdiction of any action on a promissory note or other chose in action in favor of an assignee, unless such suit might have been maintained if no assignment had been made, the jurisdiction is to be determined according to the status at the time the suit is brought; and hence an assignee of a promissory note may sue on the same in the Federal Courts if the payee or first holder is then a resident of a different State from defendant, although he was a resident of the same State when the assignment was made.—JONES v. SHAFERA, U. S. C. C. of App., 57 Fed. Rep. 457.

41. FRAUDS—Statute—Pleading.—Unless the complaint shows that the case is within the statute of frauds, such defense must be specifically pleaded.—CRANE v POWELL, N. Y., 34 N. E. Rep. 911.

42. FRAUDULENT CONVEYANCES—Preferring Creditors.—A debtor in failing circumstances has a right to secure or pay in full a portion of his creditors, to the exclusion of the others; and whether, in so doing, he was actuated with a fraudulent purpose, is a question of fact, and not of law.—KILPATRICK-KOCK DRY GOODS CO. v. MCPHEELY, Neb., 56 N. W. Rep. 389.

43. FRAUDULENT CONVEYANCES—Preferring Creditors—Chattel Mortgages.—Where several chattel mortgages are executed simultaneously for the purpose of securing debts owing by the mortgagor to the mortgagees, the aggregate of such indebtedness not being unreasonably less than the value of the property mortgaged, such mortgages will not be held void merely because no one of such is in itself sufficient to justify so great a security.—JONES v. LOREE, Neb., 56 N. W. Rep. 390.

44. GIFT—Parol—Land.—A parol gift of land, accompanied by possession, based upon a consideration meritorious, and to some extent valuable, is not of itself sufficient to pass title into the donee. Nor will the making of valuable and permanent improvements upon the property, after the death of the donor, complete the gift, although the materials for such improvements may have been ordered during the donor's lifetime, and with his knowledge.—THOMPSON v. RAY, Ga., 18 S. E. Rep. 59.

45. HABEAS CORPUS — Erroneous Conviction. — The fact that on a prosecution for willful murder with malice aforethought there was merely a verdict of guilty, without specifying any decree, on which verdict defendant was sentenced to imprisonment for life, does not authorize his discharge on *habeas corpus*, there being no jurisdictional defect.—IN RE ECKART, Wis., 56 N. W. Rep. 375.

46. HABEAS CORPUS—Federal Courts.—The power of the United States Circuit Court to grant writs of *habeas corpus* should not be exercised where petitioner is in custody under a warrant issued to recover a penalty of $50 imposed for failure to pay a license tax as peddler, and unnecessary delay in the proceeding, injustice, oppression, or inability to give the small bail required are not alleged, and he contends that the act—a recent one—by which such tax and penalty are prescribed, is violative of the exclusive constitutional authority of the United States to regulate commerce among the States; but, acting in a spirit of comity, the court should leave the question of the constitutionality of the act to the State courts, and require the petitioner to seek his remedy therein.—IN RE FLINN, U. S. C. C. (N. Car.), 57 Fed. Rep. 496.

47. HOMESTEAD—Sale— Execution.—A sale of a debtor's homestead, at the time actually occupied by himself and family as such, by a sheriff on an ordinary execution, will not divest the debtor of his title to the homestead; nor will the sheriff's deed, made in pursuance of such sale and a confirmation thereof, convey any title to the purchaser of such homestead at such sale.—BAUMANN v. FRANSE, Neb., 56 N. W. Rep. 395.

48. HOMESTEAD EXEMPTION.—The provision that the homestead shall not be exempt from the payment of a debt contracted for the purchase of the premises, or for the erection of improvements thereon, will not include a debt created by borrowing money from a third person, where there is no specific agreement or understanding that the money so borrowed is to be used in the purchase of the homestead or the erection of improvements thereon.—DREESE v. MYERS, Kan., 34 Pac. Rep. 349.

49. HUSBAND AND WIFE — Alimony and Attorney's Fees.—In an action by a wife for permanent support and maintenance, under Civil Code, § 137, an order allowing alimony and attorney's fees *pendente lite* may be made without awaiting determination of an issue raised by an answer alleging plaintiff's insanity, and praying the appointment of a guardian *ad litem* for her. —STORKE v. STORKE, Cal., 34 Pac. Rep. 339.

50. HUSBAND AND WIFE — Community Property.—Pasch. Dig. art. 4642, vests the husband with full control over the community property on the decease of his wife, empowering him to sell the same, and sue and be sued in regard thereto, in the same manner as during her lifetime, on filing in the Probate Court a full and complete inventory and appraisement, to be taken and recorded as in cases of administration: Held, that article 4652, which vests the surviving wife with exclusive management and control of the community property, under the same rights, rules, and regulations as are enacted in favor of the surviving husband, so long as she remains unmarried, empowers an unmarried surviving wife to sell the community property.—WITHROW v. ADAMS, Tex., 23 S. W. Rep. 437.

51. HUSBAND AND WIFE — Estate by Entireties.—A conveyance of land to husband and wife during coverture, each of whom pays one-half of the purchase money, vests in them an estate by entireties; and where, on a sale of the land so held, they take in their joint names an obligation for the purchase money, the presumption is that they intended to hold the latter as they did the former; and, on the death of either, the survivor becomes the sole owner, and the administrator of the deceased has no right therein.—IN RE BRAMBERRY'S ESTATE, Penn., 27 Atl. Rep. 405.

52. HUSBAND AND WIFE — Principal and Surety.—Where a husband and wife include in a trust deed as security for the debt of the husband not only property of the husband, but the separate property of the wife, her property occupies the position of a surety, and will be discharged by a valid agreement by the creditor with the husband without the knowledge of the wife for a postponement for a definite period of the sale of the property included in the deed, there being no reservation in such agreement of the creditor's rights against the wife.—HINTON v. GREENLEAF, N. Car., 18 S. E. Rep. 56.

53. INJUNCTION—Publication of Biography.—A person who holds himself out as an inventor, and whose reputation as such becomes world-wide, is a public character, and the publication of his biography cannot be restrained by injunction.—CORLISS v. E. W. WALKER CO., U. S. C. C. (Mass.), 57 Fed. Rep. 434.

54. INJUNCTION AGAINST JUDGMENT.— Rev. St. 1881, § 616, which authorizes the review of a judgment for error of law appearing in the proceedings and judgment within one year after its rendition, or, within three years, for material new matter discovered since the rendition thereof, extends the right of review to judgments at law as well as to decrees in equity; and hence, since the adoption of that statute, a court of equity cannot enjoin the enforcement of a judgment at law where such right of review exist.—ROSS v. BANTA, Ind., 34 N. E. Rep. 865.

55. INSOLVENCY—Effect of Adjudication on Lien Acquired by Execution—Death of Insolvent—Effect on Insolvency Proceedings.—A levy of execution on a debtor's property, prior to the filing of a petition in insolvency against him, gives the judgment creditor a lien on such property which is not divested, by the debtor's subsequent adjudication of insolvency; Insolvent Act 1880, § 17, which provides that such adjudication dissolves any attachment made within one month next preceding the commencement of the insolvency proceedings, being equivalent to an express declaration that it does not affect liens of any other nature.—VERMONT MARBLE CO. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Cal., 34 Pac. Rep. 326.

56. INTOXICATING LIQUORS—Illegal Sale.—One who, at the request of a proprietor of a bar, though not connected therewith, goes thereto, and procures liquor for a customer, handing the proceeds to the proprietor, is guilty of selling intoxicating liquors to the same extent as to the proprietor of the bar.—BECK v. STATE, Miss. 13 South. Rep. 835.

57. INTOXICATING LIQUORS—South Carolina "Dispensary Act."—The South Carolina "dispensary act," approved December 24, 1892 (section 25), providing that intoxicating "liquor intended for unlawful sale in this State may be seized in transit and proceeded against as if it were unlawfully kept and deposited in any place," does not authorize a constable to seize without warrant a package of liquor shipped from without the State, and stored within the State, prior to the statute taking effect, in the warehouse of a railway company, in the charge of a receiver appointed by a United States Court, and kept therein without concealment.—BOUND v. SOUTH CAROLINA RY. CO., U. S. C. C. (S. Car.), 57 Fed. Rep. 485.

58. JUDGMENT—Mistake of Counsel.—It is a genera rule that neither ignorance, mistakes, nor the misapprehension of an attorney, not occasioned by the adverse party, is any ground for vacating a judgment o granting a new trial. Neither will relief be ordinarily granted by the way of a new trial on the ground that the attorney, through design, ignorance, or negligence, mismanaged the defense.—HOLDERMAN v. JONES, Kan., 34 Pac. Rep. 352.

59. JUDGMENT—Vacation.—Under Code Civil Proc. § 473, providing that the court may relieve a party from a judgment or order taken against him through his mistake, surprise, or excusable neglect, provided that application be made within a reasonable time, but in no case more than six months after the judgment or order, the court which rendered a judgment or order has no power on an *ex parte* motion to set it aside 13 months after its rendition.—BANEGAS v. BRACKETT, Cal., 34 Pac. Rep. 344.

60. LANDLORD AND TENANT — Trade Fixtures.—An owner of land leased it for, and it was used by the lessee as, a lumber yard. By the terms of the lease, part of the land was reserved for use in common by the lessor and lessee. By consent of the former, the latter erected on the reserved part a frame building, used as the lumber office, and as a place for some of the workmen to sleep. The lessee, gave access to the office, also built some bridges of stringers, with plank nailed thereto: Held, that such building and bridges were "trade fixtures," within the meaning of Civil Code, § 1019, which provides that a tenant may remove from the demised premises, during his term, anything fixed thereto for purposes of trade, etc.— SECURITY LOAN & TRUST CO. v. WILLAMETTE STEAM MILLS LUMBERING & MANUF'G CO., Cal., 34 Pac. Rep. 321.

61. LANDLORD AND TENANT — Unlawful Detainer. — Justices of the peace have jurisdiction of actions under Code Civil Proc. § 716 *et seq.*, for the possession of premises by a landlord against a tenant holding after default in the payment of rent, as such jurisdiction is provided by the act, and Const. art. 8, § 21, expressly declares that such courts shall "have concurrent jurisdiction with the district courts in case of forcible entry and unlawful detainer." — STATE v. VOTAW, Mont., 34 Pac. Rep. 315.

62. LIBEL—Corporations— Wealth of Defendant.—In an action against a corporation for libel, evidence of defendant's wealth is not admissible as bearing on the extent of the injury, as in the case of a libel by an individual.—RANDALL v. EVENING NEWS ASS'N, Mich., 56 N. W. Rep. 361.

63. LIBEL— Privilege.—An agent of a railroad company, in answering a letter from attorneys putting in a claim for baggage of their client lost by the railroad company, has a qualified privilege, and, though he therein charged the client with the larceny of the baggage, the company will be liable only on proof of malice or the absence of honest belief in truth of the statement of the letter.—ALABAMA & N. RY. CO. v. BROOKS, Miss., 13 South. Rep. 847.

64. LIFE INSURANCE—Agreement to Divide.—Where one, after procuring insurance on her life, payable to plaintiff, had the policy changed so as to make it payable to defendant, the latter agreeing to receive the proceeds in trust for plaintiff, who accordingly delivered up for cancellation the former insurance certificate, which had been delivered to him, defendant cannot, after receiving the proceeds, refuse to pay it over to plaintiff on the ground that the latter had no insurable interest in the life of deceased.—HURD v. DOTY, Wis., 56 N. W. Rep. 371.

65. LIMITATION OF ACTIONS—Chattel Mortgages.—A second mortgagee, who has foreclosed and bought in the chattels, can plead limitation against the first mortgagee, seeking to foreclose, though the mortgagor has waived his right, and the first mortgage was not barred when the second was given.—DUNN v. SMITH, Tex., 23 S. W. Rep. 449.

66. LIQUOR LICENSES.—Laws 1891, ch. 9, §§ 1, 3, provide for the issuance of a liquor license by certain of the county or city officials on payment by the applicant therefor of the fee to the county treasurer to be credited to the school fund. Comp. Laws 1884, §§ 2903, 2904, provide for assessment of license fees and collection by the sheriff: Held that, under the laws of 1891, there is no provision for the collection of the license fee by any person, and, where the sheriff voluntarily collects the license fee, he is entitled to no commission thereon.—BOARD OF EDUCATION v. ROBINSON, N. Mex., 34 Pac. Rep. 295.

67. MANDAMUS TO JUDGE—New Trial.—*Mandamus* will not lie to compel a judge to pass upon a motion for a new trial in a cause tried before another judge, who has since died, where no competent evidence of the testimony introduced at the trial is offered upon the motion for a new trial, since without such evidence the motion could not properly be decided.—PEOPLE v. MCCONNELL, Ill., 34 N. E. Rep. 945.

68. MECHANICS' LIENS—Consent of Owner.—Where a contractor agrees to construct a building for persons wrongfully in possession of land, with full knowledge that their title is disputed, the mere silence of the true owner, or his omission to forbid the contractor from proceeding with the building, is not an implied consent by him to its erection, so as to subject the land to a lien in favor of the contractor, after the owner, who has at all times and in all reasonable ways repudiated the wrongdoer' possession, has finally recovered the land in ejectment.—SPRUCK v. MCROBERTS, N. Y., 34 N. E. Rep. 896.

69. MECHANICS' LIENS—Pleading and Proof.—Where the complaint in an action to foreclose a mechanic's lien alleges that there was no contract between the owner and the person who erected the building, there can be no judgment on proof that there was, and it is error for the court, on finding the latter, and without an amendment, to render judgment for plaintiff to the extent of 25 per cent. of the contract price, which the owner failed to keep back, as required by the statute.—REED v. NORTON, Cal., 34 Pac. Rep. 333.

70. MECHANICS' LIENS—Subcontractors.—A bill to enforce a mechanic's lien is properly dismissed where the evidence does not show what the relation was between the one with whom plaintiff claimed to have contracted and the owner, or that anything was due such person, even if he was a contractor, as alleged in the bill.—BRENNAN v. WHITE, Mich., 56 N. W. Rep. 354.

71. MORTGAGES—Absolute Deed.—Where it is sought to declare a deed absolute on its face a mortgage, the burden of proof is on the party asserting such claim, and in determining such question the situation of the parties, and all the attending circumstances, at the time the deed was agreed on and made, are to be considered.—MCKEEN v. JAMES, Tex., 23 S. W. Rep. 460.

72. MORTGAGE—Foreclosure—Decree.—A decree of foreclosure gave the mortgagor 30 days in which to pay the mortgoge debt, in default of which the mortgaged property should be sold. Afterwards the decree was amended on stipulation of the parties by inserting a clause permitting judgment creditors to redeem, such clause having been omitted from the original decree by clerical error: Held, that the 30 days ran from the rendition of the original decree, since the amendment did not change its form, force, or effect.—VAIL v. ARKELL, Ill., 34 N. E. Rep. 987.

73. MORTGAGE—Foreclosure Sale.—A purchaser at a mortgage foreclosure sale, which is invalid, as against the owner of the equity of redemption, because he was not made a party to the foreclosure action, becomes assignee of the mortgage; and, if he lawfully enters into possession, of the premises, he becomes a mortgagee in possession, and hence ejectment will not lie against him by the owner of the equity of redemption.—TOWNSHEND v. THOMPSON, N. Y., 34 N. E. Rep. 891.

74. MUTUAL BENEFIT IFSURANCE — Designation of Beneficiary.—An association amended its constitution, providing a mode by which members might designate their beneficiaries, and declaring that "where marriage is contracted after issuance of policy, and said policy becomes payable through death, it shall be paid to the widow, or, in event of her death, to their joint issue, if any, unless otherwise ordered:" Held, that where a member had, before adoption of such amendment designated his mother as his beneficiary, in the manner then provided by the constitution, the policy was payable to his mother, although he left a widow, whom he had married after issuance of the policy, since the amendment does not require the designation of another beneficiary than the widow to be made after its adoption.—BENTON v. BROTHERHOOD OF RAILROAD BRAKEMEN, Ill., 34 N. E. Rep. 939.

75. NEGOTIABLE INSTRUMENT — Assignability. — An agreement to pay interest on a certain sum during the life-time of a payee on his wife is assignable, under Rev. St. 1881, § 5501, providing that all notes or instruments in writing, signed by any person who promises to pay money, or acknowledges money to be due, shall be negotiable by indorsement.—MCWHORTER v. NORRIS, Ind., 34 N. E. Rep. 854.

76. NEGOTIABLE INSTRUMENT— Counterclaim— Parol Evidence.—In an action on an accepted draft, defendant may show by parol, in support of his counterclaim alleged to have existed prior to the acceptance, that it was agreed between the parties that the acceptance should not operate as a waiver of the claim, as such evidence does not vary the terms of the written instrument, but only rebuts the presumption of waiver.—BOHN MANUF'G CO. v. HARRISON, Mont., 34 Pac. Rep. 313.

77. NEGOTIABLE INSTRUMENT—Extension—Consideration.—A promise to pay interest is a sufficient consideration for a promise to extend the time for the payment of a note.— MOORE v. REDDING, Miss., 13 South. Rep. 849.

78. NEGOTIABLE INSTRUMENT —Parol Evidence — Fraud.—If the maker of a negotiable note proves that there was fraud in the inception of the instrument, or if the circumstances raise a strong suspicion of fraud, the owner must then respond by showing that he acquired it *bona fide* for value, in the usual course of business, while current, and under circumstances which create no presumption that he knew the facts which impeach its validity.—BROOK v. TEAGUE, Kan., 34 Pac. Rep. 347.

79. NEGOTIABLE INSTRUMENT — Payment. — Plaintiff sent for collection a demand draft on defendant, to a bank with which defendant had an account. When drafts on defendant were sent to such bank for collection he was accustomed to write his acceptance thereon, and to pass them back to the bank, where they were treated by defendant and the bank as checks. Defendant according to such custom, wrote his acceptance on the draft in suit, passed it back to the bank, and charged himself with it in his pass book, but the bank failed, and never paid plaintiff: Held, that the transaction between defendant and the bank did not constitute payment. — STATE BANK OF MIDLAND v. BYRNE, Mich., 56 N. W. Rep. 355.

80. NEGOTIABLE INSTRUMENT—Sale of Forged Note.—In an action for damages for the assignment by defendant to plaintiff of a forged note, it is not necessary for plaintiff to show diligence in an effort to collect it to entitle him to recover, even if defendant is sued as an indorser.—BALDWIN v. TRELKELD, Ind., 34 N. E. Rep. 851.

81. NEGOTIABLE INSTRUMENTS—Transfer by Corporate Officer.—Where a bank has an arrangement with a corporation whereby the bank agrees to discount notes held by the corporation, and in pursuance of such agreement such notes have customarily been brought to the bank, and been negotiated by the secretary of the corporation, such facts are sufficient evidence of the authority of the secretary to transfer a particular note and of the genuineness of the indorsement upon such note, the proceeds of the note having been placed by the bank to the corporation's credit, and paid out on the corporation's checks.—COMMERCIAL NAT. BANK OF ST. PAUL v. BRILL, Neb., 56 N. W. Rep. 382.

82. PARTNERSHIP—Ratification.—B and M were partners under an agreement providing for certain operations upon partnership lands, and upon any other tract "which shall be purchased by said copartners, as hereinafter provided." The firm lands having become exhausted, the partners consulted about buying more land, but no conclusion was reached. During M's absence in Europe a short time after the consultation, B, who had been permitted by M to transact the partnership business in his individual name, purchased other land, giving a note therefor executed in the firm name: Held, that the partnership was liable on the note, the purchase of the land and the execution of the note being within the scope of B's authority as agent for the partnership.—RUMSEY v. BRIGGS, N. Y., 34 N. E. Rep. 929.

83. PRINCIPAL AND AGENT — Action by Undisclosed Principal.—An undisclosed principal may maintain an action upon a written contract made by his agent with the agent of another, in their own names, as against the latter's undisclosed principal, where the contract itself does not contain recitals or description inconsistent with the existence of the relation of principal and agent.—DARROW v. H. R. HORNE PRODUCE CO., U. S. C. C. (Ind.), 57 Fed. Rep. 463.

84. QUIETING TITLE—Evidence.—In an action to quiet title, where complainant's title is put in issue, she must aver and prove that she is the owner of the property either by a good legal or equitable title.—CHILES v. CHAMPENOIS, Miss., 13 South. Rep. 840.

85. RAILROAD BONDS—Interest Payable from Income.—Certain railroad bonds bore interest, payable half-yearly, at a certain rate, provided that no more interest should be payable than should be certified by a vote of the majority of the directors to have been earned above expenses in the preceding six months, and in default of such certificate no interest should be payable: Held, that a bondholder could not ask for an accounting of the earnings, as of a trust fund in the company's hands for the bondholders' benefit; the obligation being merely contractual, and not fiduciary.—THOMAS v. NEW YORK & G. L. RY. CO., N. Y., 34 N. E. Rep. 877.

86. RAILWAY COMPANIES — Accidents at Crossings—Contributory Negligence.—Failure to ring the bell or blow the whistle at a crossing, as required by law, does not render a railroad company liable for an accident at a crossing, unless that be the proximate cause of the injury, and there be no such negligence on the part of the person injured as to prevent his recovery.—CHICAGO, R. I. & P. R. CO. v. CRISMAN, Colo., 34 Pac. Rep. 286.

87. RAILWAY COMPANIES — Crossings — Contributory Negligence.—Gross negligence on the part of the railroad company does not excuse negligence on the part of one injured at a railroad crossing.—CHICAGO, R. I. & P. R. CO. v. NUNEY, Colo., 34 Pac. Rep. 288.

88. RAILROAD COMPANY—Injury to Person on Track.—Where an engineer blows the whistle on seeing a man on the track, and, on discovering from the man's manner, when within 200 feet of him, that he is intoxicated, makes no effort to check the train, and there is evidence that the man was struck on the side, as he was trying to leave the track, the jury are justified in finding defendant liable.—TEXAS & P. RY. CO. v. ROBINSON, Tex., 23 S. W. Rep. 433.

89 RAILROAD COMPANY—Municipal Aid.—A proposition to vote bonds in aid of the construction of a railroad, when accepted, is in the nature of a contract, and if the electors, through false or fraudulent representations of the officers of the donee, have been induced to vote such aid, a court of equity in a proper case will relieve as against such bonds.—NASH v. BAKER, Neb., 56 N. W. Rep. 376.

90. RAILROAD COMPANY—Traveler on Highway—Negligence.—It is not gross negligence, as a matter of law, for a person who is familiar with a certain railroad crossing, and the time trains are due to pass it, to attempt to drive over it about train time, without looking to see whether the train is approaching, but such fact is to be considered by the jury with all the other circumstances in determining whether such person is guilty of gross negligence.—MANLEY v. BOSTON & M. R. CO., Mass., 34 N. E. Rep. 951.

91. REAL ESTATE BROKERS — Commission.—The commission of a broker employed to find an absolute purchaser of property at a specified price on terms agreeable to the seller, is not earned by procuring a person who is willing to execute a contract by which it is optional with him to make the payments specified therein; and on his failure to do so, the contract becomes void, and he merely forfeits the amount, if any, already paid.—TOUSEY v. ETZAL, Utah, 34 Pac. Rep. 291.

92. RECEIVERS — Actions Against.—As receivers of railroads, operating the same under legal authority, exercise the charter franchises of the company, they are subject to suit in any county in which the railroad corporation itself may be sued for a like cause of action. While their personal residence is unaffected, their official residence coincides with that of the company they represent; the action being brought to enforce official, and not personal, liability. In order to sue a receiver appointed by a court of the United States, no permission of that court is requisite, there being an act of congress dispensing therewith.—BALL v. MABRY, Ga., 18 S. E. Rep. 64.

93. REMOVAL OF CAUSES — Local Prejudice.—Under the corrected judiciary act of March 3, 1887, a suit cannot be removed from a State to a Federal Court on the ground of local prejudice, when plaintiffs are not all citizens of the State in which the suit is brought, and are yet jointly interested in the cause of action against the non-resident defendant who applies for removal.—GANN v. NORTHEASTERN R. CO., U. S. C. C. (Ga.), 57 Fed. Rep. 417.

94. SALE—Warranty.—Defendant, in Spokane Falls, telegraphed plaintiffs in Omaha: "Wire price car strictly fresh eggs, new cases." Plaintiffs replied: "Car fresh eggs, 16. Track here for immediate acceptance." Defendant answered: "If eggs strictly fresh, 14 cents. Answer if accepted." Plaintiffs replied: "Offer eggs accepted." Held, that plaintiffs warranted the eggs to be strictly fresh at Omaha, and was not liable for deterioration naturally resulting during transportation.—ENGLISH v. SPOKANE COM. CO., U. S. C. C. of App., 57 Fed. Rep. 451.

95. SALE — Warranty — Notice of Defects. — Under a contract of a sale of a machine, providing that continued use thereof should be evidence of fulfillment of the warranty that it should perform good work, retention and use of the machine, after notice to the seller of defects, at the instigation of the selling agent, and on his promise that the defects should be remedied, does not have this affect. — SPRINGFIELD ENGINE & THRESHER CO. v. KENNEDY, Ind., 34 N. E. Rep. 856.

96. SPECIFIC PERFORMANCE — Part Performance — Statute of Frauds. — Plaintiff, who purchased land,

paying part cash, the balance payable within a year, under oral agreement that he should have a deed thereof on final payment, cut wood on the land for fuel, but never entered into possession. Before the year expired, his grantor conveyed the land to defendants, who verbally agreed to carry out his contract with plaintiff: Held, an insufficient part performance by plaintiff to warrant a decree compelling defendants to convey the land to plaintiff. — FULTON V. JANSEN, Cal., 34 Pac. Rep. 331.

97. TAXATION — Capital Stock of Corporations. — The question as to the constitutionality of Act June 1, 1889 (P. L. p. 429), relating to taxation of corporations, which makes the capital stock of corporations a distinct class of investments for the purpose of taxation, and exempts corporations organized exclusively for manufacturing purposes from taxation on their capital stock, is *stare decisis*. — COMMONWEALTH V. NATIONAL OIL Co., Penn., 27 Atl. Rep. 374.

98. TAXATION — Exclusive Manufacturing Corporation.—A corporation organized under the general law providing for manufacturing companies for the purpose of manufacturing iron and steal, and which is a manufacturing company, and nothing else, is a corporation organized "exclusively" for manufacturing purposes, and its capital stock is exempt from taxation, though it has the ancillary power, which it has never exercised, to own miner all ands, and mine ore therefrom.—COMMONWEALTH V. POTTSVILLE IRON & STEEL CO., Penn., 27 Atl. Rep. 371.

99. TAXATION — Exclusive Manufacturing Corporation.—A corporation whose business is to manufacture coke, but which has and continually exercises the power to mine its own coal to supply itself in part with the raw material for manufacturing coke, is not a corporation organized "exclusively" for manufacturing purposes, within the meaning of Act 1889, exempting such corporations from taxation on their capital stock.—COMMONWEALTH V. JUNIATA COKE CO., Penn., 27 Atl. Rep. 373.

100. TAXATION — Delinquent Taxes.—St. 1880, p. 136, providing that any county "may sue in its own name for the recovery of delinquent taxes," whether such taxes be for county and State purposes, or either of them, is not repugnant to Pol. Code, § 3899, authorizing actions for delinquent taxes to be brought in the name of the people in certain cases, so as to repeal it by implication, and therefore the authority of the county to sue is not exclusive.—PEOPLE V. BALLERINO, 34 Cal., Pac. Rep. 330.

101. TAXATION — Exemption—Patent Rights.—A corporation issued certain stock in an inventor in consideration of the exclusive right, under his patents, to make and use, or license to be made and used, the inventions covered by such patents within certain specified territory; but no apparatus or tangible property, nor the use of any such property, was received for such stock: Held, that such capital stock was within the decisions which hold that no tax can be imposed by State laws on patent rights granted by the United States.—COMMONWEALTH V. PHILADELPHIA CO., Penn., 27 Atl. Rep. 378.

102. TRESPASS BY CITY—Obstructing Access to Wharf. —In an action by the owner of a wharf for injuries to his property by the building of a sewer by the city, whereby the filth was deposited in the dock, obstructing access to the wharf, plaintiff can show how his property was affected by the sewer, and that the damage could have been avoided if the city had extended the sewer on its own property further into the river.—BUTCHERS' ICE & COAL CO. V. CITY OF PHILADELPHIA, Penn., 27 Atl. Rep. 376.

103. TRESPASS TO TRY TITLE—Boundaries by Acquiescence.—Where adjoining land-owners agree on a disputed division line, and such line is acted on and acquiesced in by them, it is binding on them, and those claiming under them, without regard to the length of time it was so acted on and acquiesced in.—BAILEY V BAKER, Tex., 23 S. W. Rep. 454.

104. TRUSTS — Misappropriation of Trust Funds.—A person whose property has been misapplied by a trustee is not entitled to a lien on the estate of the trustee in the hands of an assignee for the amount wrongfully taken, in preference to the claims of other creditors, on the ground that his estate is thereby so much larger, and that the trust property is really there in substituted form, though it cannot be directly traced.—SLATER V. ORIENTAL MILLS, R. I., 27 Atl. Rep. 443.

105. TRUST — Resulting Trust.—Where the owner of land about to be sold under a mortgage procures a third person to furnish part of the money necessary to buy it, the owner herself furnishing part, a resulting trust arises in favor of the latter to the extent of the money furnished by her.—BARTON V. MAGRUDER, Miss., 13 South. Rep. 839.

106. VENDOR AND PURCHASER—Construction of Contract.—A covenant in an agreement to convey land, which provides that on non compliance by the purchasers with the terms as to payment the seller shall be free from any obligation to convey, and the purchasers shall forfeit all right thereto, time being made of the essence of the contract, authorizes the seller to avoid the contract or not, at his option, and he is not bound to tender a deed except on payment of the price.—FREEMAN V. GRISWOLD, Cal., 34 Pac. Rep. 327.

107. VENDOR AND PURCHASER — Exercise of Option—Part Performance.—Where one having a written option for the purchase of land exercises it within the prescribed time, enters into possession of the land, and expends money thereon, he may enforce the contract against the owner.—WALL V. MINNEAPOLIS, ST. P. & S. S. M. RY. CO., Wis., 56 N. W. Rep. 367.

108. VENDOR AND PURCHASER—Fraud of Purchaser.—A purchaser of land, who lives near it, is under no obligation to disclose to the owner, who resides a long distance from it, the fact that there is a prospect of a railroad being built to the place where the land is situated, even if he have knowledge of such a fact.—BURT V. MASON, Mich., 56 N. W. Rep. 365.

109. VENDOR'S LIEN.—Where land is sold and a deed executed to a married woman, and notes are given by her for the price, the vendor has an equitable lien on the land, though not expressly reserved, and though the husband did not join in the deed.—DAVIS V. WHEELER, Tex., 23 S. W. Rep. 435.

110. WATERS—Irrigation — Diversion.—The same irrigating ditch may have two or more priorities belonging to the same or different parties, and two or more persons may divert water through the same head gate for the irrigation of their several farms, without any surrender, joinder, or merger of their respective priorities.—NICHOLS V. MCINTOSH, Colo., 34 Pac. Rep. 278.

111. WATERS — Surface Water — Obstruction. — The common-law rule as to the disposition of surface water prevails in South Carolina, and a land owner has a right to take any measures necessary to protect his property therefrom, even if, in so doing, he throws it back on adjacent land, to its damage.—EDWARDS V. CHARLOTTE, C. & A. R. CO., S. Car., 18 S. E. Rep. 58.

112. WATER RIGHTS — Appropriations.—A person by the actual diversion and appropriation of the water of a stream, acquires the right to its use as against a claimant who subsequently posts notices on such stream, as provided by Civil Code, § 1415, and proceeds, as required by statute, to perfect his rights.—WELLS V. MANTES, Cal., 34 Pac. Rep. 324.

113. WILL — Contest — Privileged Communications.—The selection by the testator of the attorney who drew the will to act as an attesting witness is a waiver of the statutory privilege as to communications between attorney and client, and on a contest of the will the attorney may testify as to conversations between himself and the testator as to the character and contents of the will then desired.—PENCE V. WAUGH, Ind., 34 N. E. Rep. 960.